



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

HARVARD LAW LIBRARY



3 2044 066 108 879

USHER A. MOREN
ATTORNEY-AT-LAW

~~USHER A. MOREN,
97-419 Tremont Bldg.,
Boston, Mass.~~

HARVARD LAW LIBRARY

MASSACHUSETTS REPORTS
162

CASES ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS

JUNE 1894 — JANUARY 1895

GEORGE F. TUCKER
REPORTER

BOSTON
LITTLE, BROWN, AND COMPANY
1895

Entered according to Act of Congress, in the year 1895, by
LITTLE, BROWN, AND COMPANY,
In the Office of the Librarian of Congress, at Washington.

UNIVERSITY PRESS:
JOHN WILSON AND SON, CAMBRIDGE.

JUDGES
OF THE
SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. WALBRIDGE A. FIELD, CHIEF JUSTICE.

HON. CHARLES ALLEN.

HON. OLIVER WENDELL HOLMES.

HON. MARCUS P. KNOWLTON.

HON. JAMES M. MORTON.

HON. JOHN LATHROP.

HON. JAMES M. BARKER.

ATTORNEY GENERAL

HON. HOSEA M. KNOWLTON.

TABLE

OF THE CASES REPORTED.

Abbott (New England Trust Co. v.)	148	Boston Gas Light Co. (Carmody v.)	539
Adams (Jones v.)	224	Bosworth (Brick v.)	334
Aldrich (Field v.)	587	Boutwell (Commonwealth v.)	230
Allyn (Moynihan v.)	270	Bowditch (Williams v.)	113
Amory v. Melrose	556	Bowen v. Phinney	593
Anderson v. Duckworth	251	Bowers v. Connecticut River Railroad	312
Andrews v. Moen	294	Bowler v. O'Connell	319
Anthony v. Mercantile Mutual Accident Association	354	Boyd v. Greene	566
—— v. New York, Providence, & Boston Railroad	60	Brady v. Finn	260
Armstrong v. Forg	544	—— v. Old Colony Railroad	408
Arnold v. Reed	438	Brick v. Bosworth	334
—— (Willcox v.)	577	Bristol County Savings Bank (Booth v.)	455
Ayer (Dolloff v.)	569	Brooks (Ober v.)	102
Baker v. Commercial Union Assurance Co.	358	Brouillette v. Connecticut River Railroad	198
—— v. Thompson	40	Brown v. Baron	56
—— v. Tibbetts	468	—— (Hardiman v.)	585
—— v. Westchester Fire Ins. Co.	358	Burrough (Commonwealth v.)	513
Barnard (Murphy v.)	72	Butler v. Butler	524
Baron (Brown v.)	56	Calkins (Goss v.)	492
Bassett v. Rogers	47	Carmody v. Boston Gas Light Co.	539
Beckman v. Davidson	347	Carroll v. Daly	427
Beharrell v. Quimby	571	Casey v. Fitchburg	321
Bemis v. Temple	342	Chapin (Hersey v.)	176
Bennett v. Commercial Union Assurance Co.	29	Cheney v. Cheney	591
Bernard (Graef v.)	300	Church (Taft v.)	527
Billows v. Moors	42	Clark v. Jenkins	397
Bliss v. Johnson	323	Clarke (Commonwealth v.)	495
Blossom (Cork v.)	330	—— v. Schwarzenberg	98
Booth v. Bristol County Savings Bank	455	Clement Manuf. Co. v. Wood	173
Boston & Albany Railroad (Dowd v.)	185	Cloutier v. Grafton & Upton Railroad	471
—— (Goodes v.)	287	Clune (Commonwealth v.)	206
—— (Hubbard v.)	132	Coffin (First National Bank of Greenfield v.)	180
		—— v. Palmer	192

Cole v. Hadley	579	Derby (Commonwealth v.)	183
Collins v. Greeley	273	Dolloff v. Ayer	569
—— (Ripley v.)	450	Dowd v. Boston & Albany	
—— v. Wickwire	143	Railroad	185
Commercial Union Assurance		Doyle v. Fitchburg Railroad	66
Co. (Baker v.)	358	Drohan v. Lake Shore & Michi-	
—— (Bennett v.)	29	gan Southern Railway	435
—— (Thomas v.)	29	Ducharme (Walls v.)	432
Commonwealth v. Boutwell	230	Duckworth (Anderson v.)	251
—— v. Burrough	513		
—— v. Clarke	495	Earle (Horton v.)	448
—— v. Clune	206	Easthampton (Fales v.)	422
—— v. Crane	506	—— v. Hill	302
—— v. Creadon	466	Edmands (Commonwealth v.)	517
—— v. Crossley	515		
—— v. Davis	510	Fagnant (Noble v.)	275
—— v. Derby	183	Fales v. Easthampton	422
—— v. Edmands	517	Field v. Aldrich	587
—— v. Gay	458	—— v. Lamson & Goodnow	
—— v. Heden	521	Manuf. Co.	388
—— v. Johnson	596	Finn (Brady v.)	260
—— v. Kendall	221	First National Bank of Green-	
—— v. Kyne	146	field v. Coffin	180
—— v. Loewe	518	Fisher v. Metropolitan Life Ins.	
—— v. McConnell	499	Co.	236
—— v. Martin	402	Fitchburg (Casey v.)	321
—— v. Moore	441	Fitchburg Railroad (Doyle v.)	66
—— v. Mulhall	496	—— (Geyette v.)	549
—— v. Phillips	504	Foley v. Talbot	462
—— v. Reed	215	Forg (Armstrong v.)	544
—— v. Robertson	90	Frost (Peak v.)	298
—— v. Russell	520	Fuller v. Hyde Park	51
—— v. Skatt	219		
—— v. Smith	508	Gale (Sanborn v.)	412
—— v. Walsh	242	Galvin v. Old Colony Railroad	533
—— v. Wheeler	429	Gay (Commonwealth v.)	458
—— v. White	403	Geyette v. Fitchburg Railroad	549
Connecticut River Railroad		Gilmore v. Williams	351
(Bowers v.)	312	Gleason v. Nelson	245
—— (Brouillette v.)	198	Glendale Elastic Fabrics Co.	
Cork v. Blossom	380	(Shea v.)	463
Crane (Commonwealth v.)	506	Goodes v. Boston & Albany	
Creadon (Commonwealth v.)	466	Railroad	287
Croft, petitioner	22	Goss v. Calkins	492
Cronin v. Holyoke	257	Graef v. Bernard	300
Crossley (Commonwealth v.)	515	Grafton & Upton Railroad	
Cushing (Moore v.)	594	(Cloutier v.)	471
		Gray v. Parke	582
Daly (Carroll v.)	427	Greeley (Collins v.)	273
D'Arville (Rice v.)	559	Greene (Boyd v.)	566
Davidson (Beckman v.)	347	Gunning (Putnam v.)	552
Davis (Commonwealth v.)	510		

Hadley (Cole v.)	579	McCarthy v. Metropolitan Life	
Hall (O'Brien v.)	598	Ins. Co.	254
Hammond (Livingston v.)	375	McConnell (Commonwealth v.)	499
Hanson v. Ludlow Manuf. Co.	187	Manning (Noyes v.)	14
Hardiman v. Brown	585	Martin (Commonwealth v.)	402
Harnden (Tremblay v.)	383	Marvel v. Phillips	399
Hayes v. Norcross	546	Melrose (Amory v.)	556
Heden (Commonwealth v.)	521	—— (Hill v.)	556
Hemenway (Stearns v.)	17	Mercantile Mutual Accident	
Hersey v. Chapin	176	Association (Anthony v.)	354
Hill (Easthampton v.)	302	Merritt v. New York, New	
—— v. Melrose	556	Haven, & Hartford Railroad	326
Holyoke (Cronin v.)	257	Metropolitan Life Ins. Co.	
Hopcraft v. Kittredge	1	(Fisher v.)	236
Hopkins v. Smith	444	—— (McCarthy v.)	254
Horton v. Earle	448	Minot v. Winthrop	113
Hubbard v. Boston & Albany		Moen (Andrews v.)	294
Railroad	132	Moore (Commonwealth v.)	441
Humphrey (Ramsey v.)	385	—— v. Cushing	594
Hupfer v. Rosenfeld	131	Moors (Billows v.)	42
Hyde Park (Fuller v.)	51	Moran v. Palmer	196
Jenkins (Clark v.)	397	Morse (Van Houten v.)	414
Johnson (Bliss v.)	323	Moynihan v. Allyn	270
—— (Commonwealth v.)	596	Mulhall (Commonwealth v.)	496
Jones v. Adams	224	Murphy v. Barnard	72
Keith (Olson v.)	485	Nelson (Gleason v.)	245
Kellogg v. Leach	45	New England Trust Co. v.	
Kendall (Commonwealth v.)	221	Abbott	148
Kinsey (Thayer v.)	232	New York & New England	
Kittredge (Hopcraft v.)	1	Railroad, petitioner	564
Knight v. Knight	460	—— v. Railroad Commis-	
Kyne (Commonwealth v.)	146	sioners	81
Lake Shore & Michigan South-		New York, New Haven, &	
ern Railway (Drohan v.)	435	Hartford Railroad (Merritt	
Lamagdelaine v. Tremblay	339	v.)	326
Lambert v. Robinson	34	New York, Providence, & Bos-	
Lamson & Goodnow Manuf.		ton Railroad (Anthony v.)	60
Co. (Field v.)	388	Nichols v. Richmond	170
Lawrence (Slee v.)	405	Noble v. Fagnant	275
Leach (Kellogg v.)	45	Norcross (Hayes v.)	546
Leary (Shaughnessy v.)	108	Norwood, Selectmen of, peti-	
Levy (Sawyer v.)	190	tioners	564
L'Herbette v. Pittsfield Na-		Noyes v. Manning	14
tional Bank	137	Ober v. Brooks	102
Livingston v. Hammond	375	O'Brien v. Hall	598
Loewe (Commonwealth v.)	518	—— v. Thorogood	598
Lowell & Dracut Street Rail-		O'Connell (Bowler v.)	319
way (Sullivan v.)	536	O'Grady v. O'Grady	290
Ludlow Manuf. Co. (Hanson v.)	187	Old Colony Railroad (Brady v.)	403
		—— (Galvin v.)	533

Olson v. Keith	485	Siddall v. Pacific Mills	378
Ouillet v. Overman Wheel Co.	305	Skatt (Commonwealth v.)	219
Overman Wheel Co. (Ouillet v.)	305	Slee v. Lawrence	405
Owen Paper Co. (State Trust Co. v.)	156	Smith (Commonwealth v.)	508
Pacific Mills (Siddall v.)	378	—— (Hopkins v.)	444
Palmer (Coffin v.)	192	—— (Spaulding v.)	543
—— (Moran v.)	196	Spaulding v. Smith	543
Parke (Gray v.)	582	State Trust Co. v. Owen Paper Co.	156
Parker v. Rochester German Ins. Co.	479	Stearns v. Hemenway	17
Peabody (Toupin v.)	473	Steele (Van Deusen v.)	268
Peak v. Frost	298	Stetson (Walker v.)	86
Phillips (Commonwealth v.)	504	Sullivan v. Lowell & Dracut Street Railway	536
—— (Marvel v.)	399	Syms (Rand v.)	163
—— (West v.)	113	Taft v. Church	527
Phinney (Bowen v.)	593	Talbot (Foley v.)	462
Pittsfield National Bank (L'Herbette v.)	137	Temple (Bemis v.)	342
Putnam v. Gunning	552	Thayer v. Kinsey	232
Quimby (Beharrell v.)	571	Thomas v. Commercial Union Assurance Co.	29
Railroad Commissioners (New York & New England Railroad v.)	81	Thompson (Baker v.)	40
Ramsey v. Humphrey	385	Thorogood (O'Brien v.)	598
Rand v. Syms	163	Tibbetts (Baker v.)	468
Reed (Arnold v.)	438	Toupin v. Peabody	473
—— (Commonwealth v.)	215	Tracy v. Waters	562
Rice v. D'Arville	559	Tremblay v. Harnden	383
Richmond (Nichols v.)	170	—— (Lamagdelaine v.)	339
Ripley v. Collins	450	Upham v. Salem	483
Robertson (Commonwealth v.)	90	Van Deusen v. Steele	268
Robinson (Lambert v.)	34	Van Houten v. Morse	414
Rochester German Ins. Co. (Parker v.)	479	Walker v. Stetson	86
Rogers (Bassett v.)	47	Walls v. Ducharme	432
Rosenfeld (Hupfer v.)	131	Walsh (Commonwealth v.)	242
Russell (Commonwealth v.)	520	Waters (Tracy v.)	562
Salem (Upham v.)	483	West v. Phillips	113
Sanborn v. Gale	412	Westchester Fire Ins. Co. (Baker v.)	358
Sawyer v. Levy	190	Wheeler (Commonwealth v.)	429
Schwarzenberg (Clarke v.)	98	White (Commonwealth v.)	403
Shaughnessey v. Leary	108	Wickwire (Collins v.)	143
Shea v. Glendale Elastic Fabrics Co.	463	Willcox v. Arnold	577
		Williams v. Bowditch	113
		—— (Gilmore v.)	351
		Winthrop (Minot v.)	113
		Wood (Clement Manuf. Co. v.)	173

TABLE OF CASES

CITED BY THE COURT.

<i>Abbott v. Tucker</i> , 4 Allen, 72	21, 46	<i>Badenfeld v. Massachusetts Accident Association</i> , 154 Mass. 77	357
<i>Abend v. Terre Haute & Indianapolis Railway</i> , 17 Am. & Eng. Railroad Cas. 614	71	<i>Bailey v. New England Ins. Co.</i> 114 Mass. 177	256
<i>Adams v. Chicopee</i> , 147 Mass. 440	260	<i>Bain v. Wilson</i> , 1 J. J. Marsh. 202	437
— <i>v. Messinger</i> , 147 Mass. 185	154	<i>Baker v. Cartwright</i> , 10 C. B. (N. S.) 124	416
— <i>v. Morgan</i> , 150 Mass. 148	51	<i>Baldwin v. Calkins</i> , 10 Wend. 167	112
<i>Adley v. Whitstable Co.</i> 17 Ves. 315	161	— <i>v. Dow</i> , 130 Mass. 416	160
<i>Aerkfetz v. Humphreys</i> , 145 U. S. 418	535	<i>Ball v. Nye</i> , 99 Mass. 582	333
<i>Ahrend v. Odiorne</i> , 118 Mass. 261	569	<i>Banfield v. Whipple</i> , 14 Allen, 13	191
<i>Alden v. Thurber</i> , 149 Mass. 271	437	<i>Bank of Attica v. Manufacturers & Traders' Bank</i> , 20 N. Y. 501	151
<i>Aldrich v. Pelham</i> , 1 Gray, 510	346	<i>Barber v. Parsons</i> , 145 Mass. 203	428
<i>Alexander v. Kaiser</i> , 149 Mass. 321	509	<i>Bargate v. Shortridge</i> , 5 H. L. Cas. 297	152
<i>Allen v. Evans</i> , 161 Mass. 485	88	<i>Barnard v. Vermont & Massachusetts Railroad</i> , 7 Allen, 512	306
— <i>v. Truesdell</i> , 135 Mass. 75	299	<i>Barnes v. Lloyd</i> , 112 Mass. 224	228
<i>Almy v. Crapo</i> , 100 Mass. 218	59	— <i>v. Smith</i> , 104 Mass. 363	428
<i>American Legion of Honor v. Perry</i> , 140 Mass. 580	101	<i>Barrett v. Union Ins. Co.</i> 7 Cush. 175	34
<i>Andrews v. Worcester, Nashua, & Rochester Railroad</i> , 159 Mass. 64	532	<i>Bartlett v. Blanchard</i> , 13 Gray, 429	299
<i>Angell v. Hartford Ins. Co.</i> 59 N. Y. 171	374	— <i>v. Decreet</i> , 4 Gray, 111	324
<i>Anthony v. Travis</i> , 148 Mass. 53	538	<i>Barwick v. English Joint Stock Bank</i> , L. R. 2 Ex. 259	321
<i>Aortson v. Ridgway</i> , 18 Ill. 23	417	<i>Bascom v. Dempsey</i> , 143 Mass. 409	179
<i>Arkwright v. Newbold</i> , 17 Ch. D. 301	417	<i>Batchelder v. Queen Ins. Co.</i> 135 Mass. 449	34
<i>Ashworth v. Kittridge</i> , 12 Cush. 193	311	<i>Bates v. Norcross</i> , 14 Pick. 224	62
<i>Asiatic Banking Co., Ex parte</i> , L. R. 2 Ch. 391	568	<i>Batterbury v. Vyse</i> , 2 H. & C. 42	574
<i>Aston v. Newton</i> , 134 Mass. 507	198	<i>Baxter v. Doe</i> , 142 Mass. 558	347, 465
<i>Atcheson v. Everitt</i> , Cowp. 382	476	<i>Beachey v. Brown</i> , El., Bl. & El. 796	416
<i>Atlas Bank v. Nahant Bank</i> , 3 Met. 581	140	<i>Bean v. Farnam</i> , 6 Pick. 269	235
<i>Attersoll v. Stevens</i> , 1 Taunt. 188	65	<i>Beeman v. Banta</i> , 118 N. Y. 588	299
<i>Attorney General v. Bay State Mining Co.</i> 99 Mass. 148	120	<i>Belchier v. Reynolds</i> , 2 Kenyon, 87	155
<i>Atwood v. Chapman</i> , 68 Maine, 38	417	<i>Belfast & Moosehead Lake Railroad v. Belfast</i> , 77 Maine, 445	390
— <i>v. Williams</i> , 40 Maine, 409	598	<i>Bell v. Commonwealth</i> , 8 Grat. 600	430
<i>Auburn Theological Seminary v. Kellogg</i> , 16 N. Y. 83	144	<i>Bemis v. Temple</i> , 162 Mass. 342	384
<i>Augusta v. Hafers</i> , 61 Ga. 48	846	<i>Bench v. Merrick</i> , 1 C. & K. 463	416
<i>Austin v. Boyd</i> , 24 Pick. 64	160	<i>Bensen v. Suarez</i> , 28 How. Pr. 511	833
— <i>v. Hudson River Railroad</i> , 25 N. Y. 334	65	<i>Berrenberg v. Boston</i> , 137 Mass. 231	485
<i>Bacon v. Charlton</i> , 7 Cush. 581	286	<i>Berry v. Bakeman</i> , 44 Maine, 164	416
— <i>v. Pomeroy</i> , 104 Mass. 577	402	<i>Bertie v. Flagg</i> , 161 Mass. 504	272
		<i>Billings v. Fairbanks</i> , 139 Mass. 66	132
		— <i>v. Worcester</i> , 102 Mass. 329	259
		<i>Binney v. Russell</i> , 109 Mass. 55	141

Blackwell v. Old Colony Railroad, 122 Mass. 1	172	Bryson v. Holbrook, 159 Mass. 280	450
Blair v. Pelham, 118 Mass. 420	97, 422	Buckland v. Papillon, L. R. 1 Eq. 477	104
Blake v. Ward, 137 Mass. 94	235	Burbank v. Whitney, 24 Pick. 146	144
Blaney v. Rice, 20 Pick. 62	350	Burgess v. Keyes, 108 Mass. 48	236
Bliss v. New York Central & Hudson River Railroad, 160 Mass. 447	438	Burghardt v. Turner, 12 Pick. 534	62
Boardman v. Lake Shore & Michigan Southern Railway, 84 N. Y. 157	890	Burleigh v. Clough, 52 N. H. 267	145
Boom Co. v. Patterson, 98 U. S. 403	425	Burlen v. Shannon, 99 Mass. 200	218
Booth v. Merriam, 155 Mass. 521	272	Burns v. Ancient Order of United Workmen, 153 Mass. 173	101
Bornstein v. Lans, 104 Mass. 214	250	— v. Dockray, 156 Mass. 185	417
Boston Gas Light Co. v. Old Colony & Newport Railway, 14 Allen, 444	84	Burt v. Merchants' Ins. Co. 115 Mass. 1	63
Bouton v. American Ins. Co. 25 Conn. 542	374	Burton v. Stewart, 3 Wend. 236	437
Bouvé v. Cottle, 143 Mass. 310	286	Burwell v. Mandeville, 2 How. 560	402
Bowe v. Hunking, 135 Mass. 380	272	Bush v. Blanchard, 18 Ill. 46	376
Boyce v. Cheshire Railroad, 43 N. H. 627	465	Buswell Trimmer Co. v. Case, 144 Mass. 350	325
Boyd v. Stone, 11 Mass. 341	569	Butterfield v. Byron, 153 Mass. 517	401
Brabrook v. Boston Five Cents Sav- ings Bank, 104 Mass. 228	457	Cahill v. Eastman, 18 Minn. 324	334
Bradley v. Bradley, 160 Mass. 258	352	Cain v. State, 18 Tex. 301	430
— v. Rea, 14 Allen, 20	290	Calkins v. Hartford, 33 Conn. 57	346
Brainard v. Connecticut River Rail- road, 7 Cush. 506	172	Campbell v. New England Ins. Co. 98 Mass. 381	256
Brettun v. Fox, 100 Mass. 234	117	Carey v. Day, 36 Conn. 152	327
Brewster v. Warner, 186 Mass. 57	65	Carpenter v. Leonard, 3 Allen, 32	324
Brierly v. Davol Mills, 128 Mass. 291	347, 465	Carter v. Phillips, 144 Mass. 100	561
Briggs v. Earl, 139 Mass. 473	100	— v. Webster, 79 Ill. 435	250
— v. Gilman, 127 Mass. 530	145	Casey v. Smith, 152 Mass. 294	548
— v. Taunton, 110 Mass. 423	428	Cashman v. Chase, 156 Mass. 342	187
Brigham v. Evans, 113 Mass. 538	267	Cathcart v. Robinson, 5 Pet. 204	155
— v. Smith, 4 Gray, 297	83	Catlin v. Trustees of Trinity Col- lege, 113 N. Y. 183	126
Brightman v. Eddy, 97 Mass. 478	834	Chadborn v. Chadborn, 9 Allen, 173	235
British Mutual Banking Co. v. Charn- wood Forest Railway, 18 Q. B. D. 714	321	Chaffee v. Rutland Railroad, 55 Vt. 110	390
Broderick v. Waltham Savings Bank, 109 Mass. 149	457	Chalmers v. Smith, 152 Mass. 561	180
Brooklyn Park Commissioners v. Armstrong, 45 N. Y. 234	511	Chamberlain v. Hoogs, 1 Gray, 172	16, 340
Brooks v. Boston & Maine Railroad, 135 Mass. 21	329	Champlin v. Penn Yan, 34 Hun, 38	345
— v. Jackson, 125 Mass. 307	59	Chandler v. New York, New Haven, & Hartford Railroad, 159 Mass. 589	551
— v. Somerville, 106 Mass. 271	398	Chapman v. Coffin, 14 Gray, 454	523
Brow v. Hathaway, 13 Allen, 239	132	Chappell's case, L. R. 6 Ch. 902	152
Brown v. Bellows, 4 Pick. 179	153	Chase v. Ladd, 153 Mass. 128	42, 145
— v. Butler, 99 Mass. 179	160	Chedington's case, 1 Co. Rep. 153	104
— v. Cummings, 7 Allen, 507	538	Chemical Electric Light & Power Co. v. Howard, 150 Mass. 495	524
— v. Eastern & Midlands Rail- way, 23 Q. B. D. 391	345, 468	Cheshire v. County Commissioners, 118 Mass. 386	130
— v. Hartford Ins. Co. 117 Mass. 479	487	Chicago v. Powers, 42 Ill. 169	346
— v. Jones, 1 Atk. 188	28	Chicago & Eastern Illinois Railroad v. Boggs, 101 Ind. 522	135
— v. Montgomery, 20 N. Y. 287	417	Churchill v. Hulbert, 110 Mass. 42	38
— v. Murdock, 140 Mass. 314	179	Chute v. Quincy, 156 Mass. 189	155
— v. Pendergast, 7 Allen, 427	476	Clafin v. Boston & Albany Railroad, 157 Mass. 489	228
— v. People's Ins. Co. 11 Cush. 280	32	— v. Tilton, 141 Mass. 343	450
— v. South Boston Savings Bank, 148 Mass. 300	229	Clark v. Baird, 5 Seld. 183	417
Browne v. Doolittle, 151 Mass. 595	235	— v. Gardner, 123 Mass. 358	526
Bryant v. Isburgh, 13 Gray, 607	352	Clarke v. Watson, 18 C. B. (N. S.) 278	574
		Cleveland v. Grand Trunk Railway, 42 Vt. 449	465

Clement v. British American Assurance Co. 141 Mass. 298	562	Commonwealth v. Huntley, 156 Mass. 236	507, 521
Clifford v. Atlantic Cotton Mills, 146 Mass. 47	469	— v. Hurley, 158 Mass. 159	147
Coburn v. Travelers' Ins. Co. 145 Mass. 226	357	— v. Intoxicating Liquors, 122 Mass. 8	218
Coffee v. New York, New Haven, & Hartford Railroad, 155 Mass. 21	317	— v. Jones, 155 Mass. 170	509
Coffin v. Phenix Ins. Co. 15 Pick. 291	398	— v. Kane, 108 Mass. 423	554
Collins v. Castle, 36 Ch. D. 243	447	— v. Keenan, 148 Mass. 470	245, 542
— v. Denison, 12 Met. 549	266	— v. —, 152 Mass. 9	405
— v. Dorchester, 6 Cush. 896	846	— v. Knapp, 9 Pick. 496	214
— v. South Boston Railroad, 142 Mass. 301	548	— v. Lancaster Savings Bank, 123 Mass. 493	120
Colville v. Parker, Cro. Jac. 158	28	— v. Leach, 156 Mass. 99	347
Commonwealth v. Bakeman, 105 Mass. 53	467	— v. Lee, 148 Mass. 8	304
— v. Barnard, 6 Gray, 488	431	— v. Lowell Gas Light Co. 12 Allen, 75	120
— v. Barnstable Savings Bank, 126 Mass. 526	120	— v. Lucas, 2 Allen, 170	214
— v. Barrett, 108 Mass. 302	184	— v. Lynch, 160 Mass. 298	219
— v. Bean, 111 Mass. 438	473	— v. McCaughey, 9 Gray, 296	304
— v. Bennett, 118 Mass. 443	509	— v. McCauley, 156 Mass. 49	524
— v. Blair, 126 Mass. 40	510	— v. McClellan, 101 Mass. 84	517
— v. Bonner, 97 Mass. 587	444	— v. McConnell, 162 Mass. 499	513
— v. Boston & Lowell Railroad, 134 Mass. 211	71	— v. McGrath, 115 Mass. 150	496
— v. Boston & Worcester Railroad, 101 Mass. 201	136	— v. M'Pike, 3 Cush. 181	467
— v. Bosworth, 22 Pick. 397	405	— v. Morgan, 107 Mass. 199	444
— v. Brigham, 147 Mass. 414	459	— v. —, 159 Mass. 375	422
— v. Brown, 130 Mass. 279	510	— v. Mullen, 97 Mass. 545	444
— v. Brownell, 145 Mass. 819	169	— v. Neylon, 159 Mass. 541	147
— v. Burke, 14 Gray, 100	467	— v. Nichols, 114 Mass. 285	444
— v. Byrnes, 126 Mass. 248	516	— v. People's Five Cents Savings Bank, 5 Allen, 428	120
— v. Carrington, 116 Mass. 37	523	— v. Perley, 130 Mass. 469	221
— v. Clifford, 145 Mass. 97	245, 542	— v. Piper, 120 Mass. 185	169
— v. Costello, 123 Mass. 88	523	— v. Plaisted, 148 Mass. 375	499
— v. Costley, 118 Mass. 1	96	— v. Poisson, 157 Mass. 510	169
— v. Coy, 157 Mass. 200	96	— v. Pratt, 137 Mass. 98	509
— v. Cummings, 6 Gray, 487	430	— v. Preece, 140 Mass. 276	514
— v. Curry, 150 Mass. 509	517	— v. Provident Institution for Savings, 12 Allen, 312	120
— v. Daley, 148 Mass. 11	443	— v. Quinlan, 153 Mass. 483	304
— v. Davis, 140 Mass. 485	511	— v. Quinn, 150 Mass. 401	12
— v. Dean, 109 Mass. 349	467, 496	— v. Robertson, 5 Cush. 438	499
— v. Desmond, 141 Mass. 200	524	— v. Slate, 11 Gray, 60	509
— v. Drum, 19 Pick. 479	467, 496	— v. Springfield, 7 Mass. 9	430
— v. Ellis, 158 Mass. 555	499, 512	— v. Squires, 97 Mass. 59	467, 496
— v. —, 160 Mass. 165	218	— v. Stevenson, 142 Mass. 466	505
— v. Fenno, 125 Mass. 387	495	— v. Stodder, 2 Cush. 562	499
— v. Fenton, 139 Mass. 195	499	— v. Sullivan, 150 Mass. 315	444
— v. Finnerty, 148 Mass. 162	147	— v. Thompson, 159 Mass. 56	169
— v. Funai, 146 Mass. 570	592	— v. Tobin, 108 Mass. 426	554
— v. Gagle, 147 Mass. 576	524	— v. Tolliver, 119 Mass. 312	444
— v. Gavin, 148 Mass. 449	12	— v. Vermont & Massachusetts Railroad, 108 Mass. 7	71
— v. Goodman, 97 Mass. 117	347	— v. Vincent, 108 Mass. 441	221
— v. Gray, 129 Mass. 474	465	— v. Walker, 108 Mass. 309	467
— v. Green, 17 Mass. 515	13	— v. Wallace, 108 Mass. 12	214
— v. Haley, 4 Allen, 818	38	— v. Watson, 97 Mass. 562	305
— v. Ham, 150 Mass. 122	538	— v. Webster, 5 Cush. 295	97, 222
— v. Hamilton Manuf. Co. 12 Allen, 298	120	— v. Whitman, 118 Mass. 458	518
— v. Harper, 145 Mass. 100	519	— v. Wilson, 152 Mass. 12	214
— v. Hogarty, 141 Mass. 106	467	— v. Woods, 10 Gray, 477	214
— v. Holmes, 157 Mass. 233	97	— v. Woodward, 102 Mass. 155	96
		— v. —, 157 Mass. 516	214
		Connecticut Ins. Co. v. Commonwealth, 133 Mass. 161	120
		Cook v. Babcock, 7 Cush. 526	491

<i>Cook v. Castner</i> , 9 Cush. 266	352	<i>Dix v. Marcy</i> , 116 Mass. 416	293
— <i>v. Champlain Transportation Co.</i> 1 Denio, 91	65	<i>Dodd v. Witt</i> , 139 Mass. 63	350
<i>Coolidge v. Brigham</i> , 1 Met. 547	437	<i>Dolan v. Alley</i> , 153 Mass. 380	245
— <i>v. Neat</i> , 129 Mass. 146	416	<i>Dole v. Thurlow</i> , 12 Met. 157	61, 476
<i>Coonbs v. Fitchburg Railroad</i> , 156 Mass. 200	289	<i>Donahoe v. Old Colony Railroad</i> , 153 Mass. 356	337
<i>Cooper v. Randall</i> , 53 Ill. 24	834	<i>Donaldson v. Wilson</i> , 79 Mich. 181	80
<i>Cork v. Blossom</i> , 162 Mass. 830	421	<i>Dorr v. Fisher</i> , 1 Cush. 271	286
<i>Cory v. Thames Ironworks & Shipbuilding Co. L. R. 8 Q. B. 181</i>	299	<i>Dowd v. Chicopee</i> , 116 Mass. 93	198
<i>Costello v. Crowell</i> , 133 Mass. 352	324	<i>Dowling v. Dowling</i> , 10 Ir. C. L. 236	324
<i>Coughlin v. Gray</i> , 181 Mass. 56	88	<i>Downing v. Coyne</i> , 121 Mass. 347	533
<i>Coyle v. Cleary</i> , 116 Mass. 208	350	<i>Drury v. Hervey</i> , 126 Mass. 519	38
<i>Crane v. March</i> , 4 Pick. 181	78	<i>Dupee v. Boston Water Power Co.</i> 114 Mass. 37	152
<i>Creesy v. Willis</i> , 159 Mass. 249	59	<i>Durant v. Burt</i> , 98 Mass. 161	12, 244
<i>Croak v. Owens</i> , 121 Mass. 28	267	<i>Durkin v. Cobleigh</i> , 156 Mass. 108	581
<i>Crocker v. McGregor</i> , 76 Maine, 282	846, 465	<i>Duryee v. Dennison</i> , 5 Johns. 248	13
<i>Croft v. Alison</i> , 4 B. & Ald. 590	321	<i>Dwyer v. Fuller</i> , 144 Mass. 420	12
<i>Crossley v. Lightowler</i> , L. R. 2 Ch. 478	112	<i>Eagan v. Luby</i> , 133 Mass. 543	146
<i>Crowell v. Porter</i> , 106 Mass. 80	538	<i>Eames v. Prentice</i> , 8 Cush. 337	36
<i>Crowley v. Appleton</i> , 148 Mass. 96	13	— <i>v. Whittaker</i> , 123 Mass. 342	509
<i>Cunningham v. Pattee</i> , 99 Mass. 248	478	<i>Earle v. Coburn</i> , 130 Mass. 596	571
<i>Curry v. Porter</i> , 125 Mass. 94	336	— <i>v. Fiske</i> , 103 Mass. 491	61, 476
— <i>v. Spencer</i> , 61 N. H. 624	118	— <i>v. Hall</i> , 2 Met. 353	470
<i>Curtis v. Gano</i> , 26 N. Y. 426	811	<i>Earp v. Cummins</i> , 54 Penn. St. 394	250
<i>Cushing v. Billings</i> , 2 Cush. 158	311	<i>East River National Bank v. Gove</i> , 57 N. Y. 597	140
<i>Cushman v. Thayer Manuf. Jewelry Co.</i> 76 N. Y. 365	154	<i>Eaton v. Fitchburg Railroad</i> , 129 Mass. 364	135
<i>Cutter v. Williams</i> , 3 Allen, 196	89	<i>Eddy v. Gray</i> , 4 Allen, 435	244
<i>Daily v. New York & New Haven Railroad</i> , 32 Conn. 356	327	<i>Edwards v. Gale</i> , 52 Maine, 360	104
<i>Dale v. Harris</i> , 103 Mass. 193	132	<i>Egan v. Bowker</i> , 5 Allen, 449	510
<i>Daniels v. Pratt</i> , 143 Mass. 216	101	<i>Ela v. Cockshott</i> , 119 Mass. 416	232, 338
<i>Darling v. Westmoreland</i> , 52 N. H. 401	845, 465	<i>Eliot National Bank v. Beal</i> , 141 Mass. 566	401
<i>Davies v. Roper</i> , 2 Jur. (N. S.) 167	399	<i>Ellis v. Short</i> , 21 Pick. 142	538
<i>Davis v. County Commissioners</i> , 153 Mass. 218	172	<i>Elmor's case</i> , 1 Cro. Eliz. 184	430
— <i>v. Foreman</i> , [1894] 3 Ch. 654	561	<i>Emerson v. Patch</i> , 129 Mass. 299	376
— <i>v. Goodenow</i> , 27 Vt. 715	376	<i>Emery v. Gordon</i> , 6 Stew. 447	78
— <i>v. Houghtellin</i> , 38 Neb. 582	321	<i>England v. Boston & Maine Railroad</i> , 153 Mass. 490	329
— <i>v. New York, New Haven, & Hartford Railroad</i> , 159 Mass. 532	186, 472	<i>Estabrook v. Swett</i> , 116 Mass. 303	437
— <i>v. Old Colony Railroad</i> , 131 Mass. 258	140	<i>Estes v. Cook</i> , 22 Pick. 295	62
— <i>v. Second Universalist Meeting-House</i> , 8 Met. 321	151	<i>Evansville & Richmond Railroad v. Maddux</i> , 184 Ind. 571	71
<i>Day v. Caton</i> , 119 Mass. 513	571	<i>Everett v. Edwards</i> , 149 Mass. 588	88
<i>Dean v. American Legion of Honor</i> , 156 Mass. 435	101, 256	— <i>v. Henderson</i> , 150 Mass. 411	16
<i>Delphi v. Lowery</i> , 74 Ind. 520	346	<i>Eyre v. Jacob</i> , 14 Grat. 422	119
<i>Demeritt v. Miles</i> , 22 N. H. 523	824	<i>Fair v. Manhattan Ins. Co.</i> 112 Mass. 320	145
<i>Denny v. Williams</i> , 5 Allen, 1	898	<i>Farnum v. Bascom</i> , 122 Mass. 282	59
<i>Des Plaines v. Poyer</i> , 123 Ill. 348	511	— <i>v. Pitcher</i> , 151 Mass. 470	169
<i>Devoe v. Brandt</i> , 53 N. Y. 462	417	<i>Fay v. Minneapolis & St. Louis Railway</i> , 30 Minn. 231	317
<i>De Young v. De Young</i> , 6 La. An. 786	28	— <i>v. Muzzey</i> , 13 Gray, 53	235
<i>Dickey v. Linscott</i> , 20 Maine, 453	401	— <i>v. Whitman</i> , 100 Mass. 76	347
<i>Dill v. Wareham</i> , 7 Met. 438	140	<i>Feely v. Pearson Cordage Co.</i> 161 Mass. 426	289
<i>District of Columbia v. Armes</i> , 107 U. S. 519	346, 466	<i>Felt v. Boston & Maine Railroad</i> , 161 Mass. 311	551
		<i>Ferren v. Old Colony Railroad</i> , 143 Mass. 197	535
		<i>Field v. New York Central Railroad</i> , 32 N. Y. 839	465

<i>Finnegan v. Fall River Gas Works</i> , 159 Mass. 311	587	<i>Goldthwait v. Day</i> , 149 Mass. 185	591
<i>First Baptist Church v. Brooklyn</i> Ins. Co. 19 N. Y. 305	374	— <i>v. Haverhill & Groveland</i> Street Railway, 160 Mass. 554	289
<i>First National Bank of Easton v.</i> Smith, 133 Mass. 26	191	<i>Gooding v. Shea</i> , 103 Mass. 360	179
<i>First National Bank of Monmouth v.</i> Brooks, 3 Nat. Bank Cas. 237	140	<i>Gorham v. Gross</i> , 125 Mass. 232	333
<i>Fish v. Kempton</i> , 7 C. B. 687	80	<i>Gottlieb v. New York, Lake Erie, &</i> <i>Western Railroad</i> , 155 Mass. 21	317
<i>Fisher v. Boston</i> , 104 Mass. 87	571	<i>Gould v. Mansfield</i> , 103 Mass. 408	569
— <i>v. McGirr</i> , 1 Gray, 1	218	<i>Grand Trunk Railroad v. Richard-</i> <i>son</i> , 91 U. S. 454	465
<i>Fisk v. Fitchburg Railroad</i> , 158 Mass. 238	289	<i>Gray v. Boston Gas Light Co.</i> 114 Mass. 149	333
— <i>v. Tank</i> , 12 Wis. 276	299	— <i>v. Harris</i> , 107 Mass. 492	332
<i>Fiske v. Steele</i> , 152 Mass. 260	352	<i>Green v. Hogan</i> , 153 Mass. 462	449
<i>Fitch v. Stevens</i> , 4 Met. 426	425	— <i>v. Low</i> , 22 Beav. 625	104
<i>Fitzgerald v. Williams</i> , 148 Mass. 462	509	<i>Grindle v. Eastern Express Co.</i> 67 Maine, 317	299
— <i>v. Woburn</i> , 109 Mass. 204	259	<i>Gring v. Lerch</i> , 112 Penn. St. 244	416
<i>Fletcher v. Fitchburg Railroad</i> , 149 Mass. 127	135	<i>Guild v. Richards</i> , 16 Gray, 309	448
<i>Flint v. Gibson</i> , 106 Mass. 391	154	<i>Haley v. Bellamy</i> , 137 Mass. 357	153
<i>Flynn v. North American Ins. Co.</i> 115 Mass. 449	256	<i>Hall v. Lowell</i> , 10 Cush. 260	346
<i>Fortin v. Easthampton</i> , 142 Mass. 486	55	<i>Hamilton v. Boston Port & Seamen's</i> <i>Aid Society</i> , 126 Mass. 407	876
<i>Foss v. Richardson</i> , 15 Gray, 308	334	<i>Hamilton Woollen Co. v. Goodrich</i> , 6 Allen, 191	12
<i>Foster v. Bailey</i> , 157 Mass. 160	235	<i>Hammond v. County Commissioners</i> , 154 Mass. 509	172
— <i>v. Leach</i> , 160 Mass. 418	21, 46	— <i>v. Wadhams</i> , 5 Mass. 353	13
— <i>v. Smith</i> , 156 Mass. 379	461	<i>Hannem v. Pence</i> , 40 Minn. 127	334
<i>Fox v. Hazleton</i> , 10 Pick. 275	153	<i>Hano v. Bigelow</i> , 155 Mass. 341	447
<i>Franklin v. Brownlow</i> , 14 Ves. 550	561	<i>Harding v. Littlehale</i> , 150 Mass. 100	100
<i>Freeman v. Travelers' Ins. Co.</i> 144 Mass. 572	357	<i>Harrington v. Bigelow</i> , 2 Denio, 109	13
<i>Freeman's National Bank v. Savery</i> , 127 Mass. 75	75	<i>Harris v. Harris</i> , 153 Mass. 439	112
<i>Fries v. Brugler</i> , 7 Halst. 79	473	— <i>v. Nickerson</i> , L. R. 8 Q. B. 286	558
<i>Friesmuth v. Agawam Ins. Co.</i> 10 Cush. 587	32	<i>Harrison v. Conlan</i> , 10 Allen, 85	401
<i>Frost's case</i> , 127 Mass. 550	16	<i>Hartshorn v. South Reading</i> , 3 Allen, 501	172
<i>Fuller v. Hyde Park</i> , 162 Mass. 51	403	<i>Harvey v. Eastern Railroad</i> , 116 Mass. 269	329
<i>Gagg v. Vetter</i> , 41 Ind. 228	334	<i>Hastings v. Stetson</i> , 130 Mass. 76	510
<i>Gahagan v. Boston & Lowell Rail-</i> <i>road</i> , 1 Allen, 187	347	<i>Hathaway v. Evans</i> , 108 Mass. 267	350
<i>Gardner v. Brookline</i> , 127 Mass. 358	425	— <i>v. Hatchard</i> , 160 Mass. 296	86
— <i>v. Lane</i> , 12 Allen, 39	34	<i>Hawes v. Knowles</i> , 114 Mass. 518	320
— <i>v. Weymouth</i> , 155 Mass. 595	54	<i>Hawkins v. Graham</i> , 128 Mass. 20	428
<i>Gavett v. Manchester & Lawrence</i> <i>Railroad</i> , 16 Gray, 501	329	<i>Hawks v. Charlemont</i> , 107 Mass. 414	320
<i>George v. Gobey</i> , 128 Mass. 289	320	<i>Healy v. Reed</i> , 153 Mass. 197	126
— <i>v. Wood</i> , 9 Allen, 80	78	<i>Heath v. Randall</i> , 4 Cush. 195	37
<i>Georgetown, Breckenridge, & Lead-</i> <i>ville Railway v. Eagles</i> , 9 Col. 544	334	<i>Henry v. Great Northern Railway</i> , 1 DeG. & J. 606	398
<i>Gibson v. Farley</i> , 16 Mass. 280	59	<i>Hewes v. Dehon</i> , 3 Gray, 205	59
<i>Gifford v. Choate</i> , 100 Mass. 343	144	<i>Heywood v. Reed</i> , 4 Gray, 574	325
<i>Gillett v. Camp</i> , 27 Mo. 541	876	<i>Higgins v. Andrews</i> , 121 Mass. 293	324
<i>Gillshannon v. Stony Brook Rail-</i> <i>road</i> , 10 Cush. 228	70	<i>Higham v. Ridgway</i> , 10 East, 109	324
<i>Gilman v. Eastern Railroad</i> , 10 Allen, 233	70	<i>Hill v. Bartlett</i> , 124 Mass. 399	21, 46
<i>Gleason v. McKay</i> , 134 Mass. 419	121	— <i>v. Eldridge</i> , 126 Mass. 234	505
<i>Goddard v. Monitor Ins. Co.</i> 108 Mass. 56	34	— <i>v. Gray</i> , 1 Stark. 434	417
		<i>Hinckley v. Barnstable</i> , 109 Mass. 126	346
		<i>Hitchcock v. Baker</i> , 2 Allen, 431	21
		— <i>v. Galveston</i> , 96 U. S. 341	140
		<i>Hodges v. Shuler</i> , 22 N. Y. 114	161
		<i>Hodgkins v. Chappell</i> , 128 Mass. 197	347, 465

Hogan v. Cregan, 6 Rob. (N. Y.)	188	478	Kimball v. Howard Ins. Co. 8 Gray,	83	32
Holst v. Stewart, 154 Mass.	445	268	— v. Story, 108 Mass.	382	450
— v. —, 181 Mass.	516	266	King, The, v. Moor Critchell, 2 East,	66	430
Holt v. Holt, 2 P. Wms.	648	28	King v. Nichols, 138 Mass.	18	334
Hooten v. Comerford, 152 Mass.	591	350	Kingsland v. Tucker, 115 N. Y.	574	59
Horsey v. Graham, L. R. 5 C. P.	9	568	Kinnaird v. Standard Oil Co. 89 Ky.	468	334
Hoamer v. Warner, 7 Gray,	186	280	Kirkman v. Booth, 11 Beav.	273	402
House v. Metcalf, 27 Conn.	681	345, 465	Kleinst v. Kunhardt, 160 Mass.	230	289
Howe v. Alger, 4 Allen,	206	581	Knight v. New England Worsted Co.	2 Cush. 271	51
— v. Newmarch, 12 Allen,	49	320	Kniedler, In re, 140 N. Y.	377	119
Howland v. Blake Manuf. Co. 156	Mass. 543	341	Kuhn v. Webster, 12 Gray,	3	154
— v. Crocker, 7 Allen,	153	62	Kullberg v. O'Donnell, 158 Mass.	405	523
Hubbard v. Knous, 7 Cush.	556	286	Kyte v. Commercial Union Assur-	ance Co. 144 Mass. 43	482
Hubner v. Hoffman, 106 Mass.	346	428	Ladd v. Rogers, 11 Allen,	209	571
Hughes v. Lawrence, 160 Mass.	474	260	Laird v. Mooney, 32 Minn.	368	594
Hunt v. Brown, 146 Mass.	253	352	Lamb v. Pierce, 118 Mass.	72	478
— v. Lowell Gas Light Co. 1 Al-	len, 343	465	Lantz v. Frey, 14 Penn. St.	201	376
— v. —, 8 Allen, 169	347, 465	492	Lavery v. Egan, 143 Mass.	389	118
Hurley v. O'Sullivan, 137 Mass.	86	492	Lawless v. Connecticut River Rail-	road, 136 Mass. 1	818
Hussey v. Roundtree, Busb. (N. C.)	110	376	Lawrence v. Chase, 54 Maine,	196	609
Hutchinson v. York, Newcastle, &	Berwick Railway, 6 Exch.	343	— v. Jenkins, L. R. 8 Q. B.	274	333
Ide v. Ide, 5 Mass.	500	144, 461	Learoyd v. Godfrey, 138 Mass.	315	470
International & Great Northern Rail-	way v. Ryan, 82 Tex.	565	Leary v. Duff, 137 Mass.	137	440
Irwin v. Alley, 158 Mass.	240	551	Lee v. Howard Ins. Co. 3 Gray,	583	32
Jackson v. Buchanan, 59 Ind.	390	414	— v. Kilburn, 3 Gray,	594	325, 428
— v. Bull, 10 Johns.	19	144	— v. Kirby, 104 Mass.	420	155
— v. Stevenson, 156 Mass.	496	447	— v. Wheeler, 11 Gray,	236	325
James v. Johnson, 6 Johns. Ch.	417	78	Leeds v. Cook, 4 Esp.	256	410
Jenkins v. Quincy Ins. Co. 7 Gray,	370	34	Leonard v. Bolton, 153 Mass.	428	16
Johnson v. Gibbs, 140 Mass.	186	476	— v. Robbins, 13 Allen,	217	533
— v. Goss, 132 Mass.	274	28	Levi v. Brooks, 121 Mass.	501	320
— v. Holyoke, 105 Mass.	80	299	Limpus v. London General Omnibus	Co. 1 H. & C. 526	321
— v. Knapp, 146 Mass.	70	112	Lincoln v. Boston, 148 Mass.	578	511
Joslin v. Rhoades, 150 Mass.	301	144, 461	— v. McClatchie, 86 Conn.	186	250
Kansas City, Memphis, & Birming-	ham Railroad v. Phillips, 98 Ala.	159	Litchfield v. Hutchinson, 117 Mass.	195	206
Keene v. New England Accident As-	sociation, 161 Mass.	149	Littlejohn v. Fitchburg Railroad,	148 Mass. 478	71
Keith v. Cheshire Railroad, 1 Gray,	614	84	Lockhart v. Van Alstyne, 31 Mich.	76	800
— v. New Haven & Northampton	Co. 140 Mass. 175	317	Logan County National Bank v.	Townsend, 139 U. S. 67	140
— v. Wheeler, 159 Mass.	161	478	Loomis v. Wadhams, 8 Gray,	557	554
Kellard v. Rooke, 19 Q. B. D.	585	187	Lothrop v. Otis, 7 Allen,	435	286
— v. —, 21 Q. B. D.	367	187	Loud v. Hall, 106 Mass.	404	250
Kelley v. Meins, 135 Mass.	231	144, 461	Lovejoy v. Boston & Lowell Rail-	road, 125 Mass. 79	289
Kellogg v. Loomis, 16 Gray,	48	62	— v. Dolan, 10 Cush.	495	169
— v. Smith, 7 Cush.	375	350	— v. Lovett, 124 Mass.	270	350
— v. Waite, 99 Mass.	501	526	Low v. Elwell, 121 Mass.	309	38
Kendall v. May, 10 Allen,	59	145	Lowe v. Clinton, 136 Mass.	24	198
Kent v. Morrison, 153 Mass.	137	42, 145	Lucas v. New Bedford & Taunton	Railroad, 6 Gray, 64	329
Khron v. Brock, 144 Mass.	516	333	Lumley v. Wagner, 1 DeG., M. & G.	604	560
Kidder v. Dunstable, 11 Gray,	342	846	Luther v. Worcester, 97 Mass.	268	259
Kidney v. Stoddard, 7 Met.	252	417			
Killam v. Peirce, 153 Mass.	502	519			

<i>Lynch v. Allyn</i> , 160 Mass. 248	387	<i>Moore v. Burlington</i> , 49 Iowa, 136	346
— <i>v. Boston & Albany Railroad</i> , 159 Mass. 636	472, 535	— <i>v. Erickson</i> , 158 Mass. 71	594
<i>McAuliffe v. New Bedford</i> , 155 Mass. 216	511	<i>Moors v. Goddard</i> , 147 Mass. 287	526
<i>McCalmont v. Whitaker</i> , 8 Rawle, 84	426	— <i>v. Washburn</i> , 159 Mass. 172	112
<i>McCluskey v. Providence Washing- ton Ins. Co.</i> 126 Mass. 806	34	<i>Morehouse v. Moulding</i> , 74 Ill. 323	594
— <i>v. Provident Institution for Savings</i> , 103 Mass. 300	457	<i>Moreland v. Boston & Providence Railroad</i> , 141 Mass. 31	333
<i>McKean v. Salem</i> , 148 Mass. 109	245	<i>Moriarty v. London, Chatham, & Dover Railway</i> , L. R. 5 Q. B. 314	510
<i>Mackin v. Boston & Albany Rail- road</i> , 135 Mass. 201	317	<i>Morier v. St. Paul, Minneapolis, & Manitoba Railway</i> , 31 Minn. 351	321
— <i>v. People</i> , 115 Ill. 312	444	<i>Morris v. Bacon</i> , 123 Mass. 58	79
<i>McMahon v. O'Connor</i> , 137 Mass. 216	232, 338	<i>Morse v. Bassett</i> , 132 Mass. 502	59
<i>M'Mechan v. Griffing</i> , 3 Pick. 149	476	— <i>v. Copeland</i> , 2 Gray, 302	581
<i>M'Nally v. Gradwell</i> , 16 Ir. Ch. 512	561	— <i>v. Potter</i> , 4 Gray, 242	142
<i>McNeal v. Emerson</i> , 15 Gray, 384	37	— <i>v. Richmond</i> , 41 Vt. 435	346
<i>McPherson</i> , In re, 104 N. Y. 806	119	— <i>v. Rogers</i> , 118 Mass. 573	491
<i>Mager v. Grima</i> , 8 How. 490	117	<i>Morville v. American Tract Society</i> , 123 Mass. 129	140
<i>Maguire v. Fitchburg Railroad</i> , 146 Mass. 379	472, 551	<i>Moss v. Barton</i> , L. R. 1 Eq. 474	104
— <i>v. Middlesex Railroad</i> , 115 Mass. 239	406, 538	<i>Moulton v. Newburyport Water Co.</i> 137 Mass. 163	426
<i>Maher v. Boston & Albany Railroad</i> , 158 Mass. 36	551	<i>Mulhern v. McDavitt</i> , 16 Gray, 404	376
<i>Mahoney v. Libbey</i> , 123 Mass. 20	333	<i>Mullen v. Old Colony Railroad</i> , 127 Mass. 86	437
<i>Maine v. Cumston</i> , 98 Mass. 317	89	— <i>v. St. John</i> , 57 N. Y. 567	334
— <i>v. Harper</i> , 4 Allen, 115	501	<i>Mullett v. Mason</i> , L. R. 1 C. P. 559	299
<i>Mainprice v. Westley</i> , 6 B. & S. 420	568	<i>Murdock v. Murdock</i> , 7 Cal. 511	376
<i>Mallory v. La Crosse Abattoir Co.</i> 80 Wis. 170	504	<i>Nason v. Boston</i> , 14 Allen, 508	259
<i>Mansfield v. Hodgdon</i> , 147 Mass. 304	437	<i>National Bank of North America v.</i> Kirby, 108 Mass. 497	79
<i>Manufacturers' Ins. Co. v. Loud</i> , 99 Mass. 146	120	<i>National Mechanics & Traders' Bank v. Eagle Sugar Refinery</i> , 109 Mass. 38	191
<i>Manville v. Cleveland & Toledo Rail- road</i> , 11 Ohio St. 417	71	<i>Neff v. Wellesley</i> , 148 Mass. 487	12
<i>Martin v. Richards</i> , 155 Mass. 381	272	<i>Newcomb v. Stebbins</i> , 9 Met. 540	59
<i>Martinsburg & Potomac Railroad v.</i> March, 114 U. S. 549	154	— <i>v. Williams</i> , 9 Met. 525	235
<i>Matthews v. Dixey</i> , 149 Mass. 595	88	<i>Newell v. Borden</i> , 128 Mass. 31	579
— <i>v. Wallwyn</i> , 4 Ves. 118	78	<i>New England Glass Co. v. Lovell</i> , 7 Cush. 319	311
<i>Mattingly v. State</i> , 8 Tex. App. 345	444	<i>New Hampshire Ins. Co. v. Healey</i> , 151 Mass. 537	245
<i>May v. Gates</i> , 137 Mass. 389	112	<i>Newman v. French</i> , 45 Hun. 65	104
<i>Maynard v. Northampton</i> , 157 Mass. 218	425	<i>New York, Lake Erie, & Western Railroad v. Nickals</i> , 119 U. S. 296	396
<i>Mears v. Dole</i> , 135 Mass. 508	333	<i>Nichols v. Marsland</i> , 2 Ex. D. 1	333
<i>Mellen v. Morrill</i> , 126 Mass. 545	469	— <i>v. —</i> , L. R. 10 Ex. 255	333
<i>Merchants' Ins. Co. v. Abbott</i> , 131 Mass. 397	583	— <i>v. Nichols</i> , 136 Mass. 266	524
<i>Merrill v. Bradford</i> , 110 Mass. 506	346	<i>Nims v. Ford</i> , 159 Mass. 575	256
<i>Meservey v. Lockett</i> , 181 Mass. 332	170	<i>Nitro Phosphate & Odania Chemical Manure Co. v. London & St. Katha- rine Docks Co.</i> 9 Ch. D. 503	333
<i>Messenger v. Dennie</i> , 137 Mass. 197	548	<i>Nolan v. Whitney</i> , 88 N. Y. 648	574
— <i>v. —</i> , 141 Mass. 335	548	<i>Norwood v. New York & New Eng- land Railroad</i> , 161 Mass. 259	85
<i>Miles v. Barrows</i> , 122 Mass. 579	350	— <i>v. Somerville</i> , 159 Mass. 105	55
<i>Miller v. Curtis</i> , 158 Mass. 127	538	<i>Noyes v. Manning</i> , 159 Mass. 446	16
— <i>v. Lyon</i> , 6 Allen, 514	428	<i>Nudd v. Hamblin</i> , 8 Allen, 130	414
— <i>v. Ratterman</i> , 47 Ohio St. 141	393	<i>O'Brien v. Boston & Albany Rail- road</i> , 138 Mass. 387	70
<i>Mitchell v. Crassweller</i> , 13 C. B. 237	321	<i>O'Connell v. Baltimore & Ohio Rail- road</i> , 20 Md. 212	71
<i>Moffatt v. Farquhar</i> , 7 Ch. D. 591	162	<i>O'Donnell v. Clinton</i> , 145 Mass. 461	437
<i>Monk v. Beal</i> , 2 Allen, 585	532	<i>Ogden v. Ogden</i> , 1 Bland, 284	28

Oliver v. Washington Mills, 11 Allen, 268	122	Quinn v. Perham, 151 Mass. 162	272
O'Maley v. South Boston Gas Light Co. 158 Mass. 135	289	Quinsigamond Bank v. Hobbs, 11 Gray, 250	587
Ostrom v. Jacobs, 9 Met. 454	532	Ramsdell v. Ramsdell, 21 Maine, 288	144
Owen v. Bartholomew, 9 Pick. 520	850	Ramsden v. Hylton, 2 Ves. Sen. 304	28
Paine v. Boston, 4 Allen, 168	558	Randall v. Baltimore & Ohio Railroad, 109 U. S. 478	289, 398
Palmer v. Clark, 106 Mass. 373	153	— v. Chase, 133 Mass. 210	97
— v. Paine, 9 Gray, 56	62	— v. Newson, 2 Q. B. D. 102	299
Park v. Johnson, 4 Allen, 259	155	Ranger v. Great Western Railway, 5 H. L. Cas. 72	155
Parker v. Bell, 7 Gray, 429	593	Ray v. Powers, 134 Mass. 22	579
— v. Osgood, 3 Allen, 487	478	Raymond v. Danbury & Norwalk Railroad, 43 Conn. 596	327
— v. Page, 4 Gray, 533	16	Read v. Cambridge, 124 Mass. 567	523
— v. Tainter, 123 Mass. 185	293	Readman v. Conway, 126 Mass. 374	472
Parkinson Sugar Co. v. Riley, 50 Kans. 401	71	Reeve v. Dennett, 145 Mass. 23	840, 465
Parkman v. Suffolk Savings Bank, 151 Mass. 218	457	Reeves v. State, 20 Ala. 83	431
Passinger v. Thorburn, 34 N. Y. 634	299	Regina v. Beard, 8 C. & P. 142	501
Pearson v. Stoddard, 9 Gray, 199	160	— v. Boucher, 8 C. & P. 141	503
Penney, Ex parte, L. R. 8 Ch. 446	152	— v. Butcher, 2 Mod. & Rob. 228	501
Pennsylvania Railroad v. Matthews, 7 Vroom, 531	185	— v. Malings, 8 C. & P. 242	501
People v. Breese, 7 Cowen, 429	431	— v. Manzano, 2 F. & F. 64	501
— v. Cox, 21 Hun, 47	473	— v. O'Connor, 5 Q. B. 16	429
— v. Globe Ins. Co. 91 N. Y. 174	401	— v. Rhodes, 2 Ld. Raym. 886	430
Perkins v. Stickney, 182 Mass. 217	587	— v. Walking, 8 C. & P. 243	503
Perry v. Cross, 132 Mass. 454	144	Rex v. O'Coigly, 26 How. St. Tr. 1191	500
— v. Weeks, 137 Mass. 584	62	— v. Thistlewood, 38 How. St. Tr. 682	501
Pettingell v. Chelsea, 161 Mass. 368	571	— v. Watson, 32 How. St. Tr. 1	501
Phinizy v. Augusta, 47 Ga. 260	334	Reynolds v. Reynolds, 3 Allen, 605	416
Pierce v. Cunard Steamship Co. 158 Mass. 87	472	Rice v. Boston & Worcester Railroad, 12 Allen, 141	448
— v. Phillips, 101 Mass. 313	21	Richards v. May, 10 Q. B. D. 400	154
Pinkham v. Topsfield, 104 Mass. 78	259	— v. Richards, 9 Gray, 313	569
Plimpton v. Fuller, 11 Allen, 139	59	Richardson v. Hall, 124 Mass. 228	59
Pomroy v. Stevens, 11 Met. 244	478	— v. New York Central Railroad, 45 N. Y. 846	135
Pond v. Pond, 132 Mass. 219	414	— v. Tobey, 121 Mass. 457	89
Poole v. Middleton, 29 Beav. 646	152	Rideout v. Knox, 148 Mass. 368	544
Porter v. United States Ins. Co. 160 Mass. 183	482	Riley v. Hale, 158 Mass. 240	352
Portland Bank v. Apthorp, 12 Mass. 252	119	Rindge v. New England Aid Society, 146 Mass. 286	100, 256
Potts v. Chapin, 183 Mass. 276	417	Ring v. Phoenix Assurance Co. 145 Mass. 426	83
Poussard v. Spiers, 1 Q. B. D. 410	401	Robbins v. Clark, 129 Mass. 145	154
Prentiss v. Russ, 16 Maine. 30	417	Roberts v. Boston, 149 Mass. 346	267
Price v. Assheton, 1 Y. & C. Ex. 441	561	Robinson v. Fitchburg & Worcester Railroad, 7 Gray, 92	465
Prime, In re, 136 N. Y. 347	126	Rock v. Indian Orchard Mills, 142 Mass. 522	836
Prince v. Smith, 4 Mass. 455	591	Rockwood v. Robinson, 159 Mass. 406	65
Probert v. Phipps, 149 Mass. 258	169	Root v. Burt, 118 Mass. 521	298
Providence & Worcester Railroad v. Worcester, 155 Mass. 35	420	Rosenberg v. Doe, 143 Mass. 191	437
Pullen v. County Commissioners, 66 N. C. 361	119	Russell v. Hudson River Railroad, 17 N. Y. 184	71
Putnam v. Home Ins. Co. 123 Mass. 324	374	Sackett v. Ruder, 152 Mass. 397	71
Putnam Tool Co. v. Fitchburg Ins. Co. 145 Mass. 265	482	St. John v. Erie Railway, 22 Wall 136	390
Quincy Canal v. Newcomb, 7 Met. 276	172		
Quinlan v. Utica, 11 Hun, 217	345		
— v. —, 74 N. Y. 603	345		

<i>Sampeon v. Henry</i> , 18 Pick. 36	36	<i>Stafford's case</i> , 8 Co. Rep. 73	104
<i>Sanborn v. Fireman's Ins. Co.</i> 16 Gray, 448	142, 374	<i>Standish v. Lawrence</i> , 111 Mass. 111	89
<i>Savage v. Mason</i> , 3 Cush. 500	89	<i>Stanton v. Springfield</i> , 12 Allen, 566	269
<i>Schofield v. Chicago, Milwaukee, & St. Paul Railway</i> , 114 U. S. 615	398	<i>Star Glass Co. v. Morey</i> , 108 Mass. 570	352
<i>Scholey v. Rew</i> , 23 Wall. 381	118	<i>State v. Dalrymple</i> , 70 Md. 294	119
<i>Schoonmaker v. Wilbraham</i> , 110 Mass. 134	346	— <i>v. Haney</i> , 67 N. C. 467	97
<i>Scott v. Bay</i> , 3 Md. 431	334	— <i>v. Horner</i> , 86 Mo. 71	399
<i>Seaver v. Boston & Maine Railroad</i> , 14 Gray, 466	70	— <i>v. McCracken</i> , 20 Mo. 411	430
<i>Shaffers v. General Steam Navigation Co.</i> 10 Q. B. D. 356	187	— <i>v. Maxwell</i> , 28 La. An. 361	444
<i>Sharp v. Croysey</i> , 11 Barb. 224	376	— <i>v. Patterson</i> , 2 Ired. 346	473
<i>Sharpe v. San Paulo Railway</i> , L. R. 8 Ch. 597	154	— <i>v. United States & Canada Express Co.</i> 60 N. H. 219	118
<i>Shattuck v. Stoneham Branch Railroad</i> , 6 Allen, 115	558	<i>Stearns v. Hemenway</i> , 162 Mass. 17	40
<i>Shaw v. Boston & Albany Railroad</i> , 159 Mass. 597	172	<i>Stebbins v. Miller</i> , 12 Allen, 591	324
— <i>v. Knox</i> , 98 Mass. 214	595	<i>Stevens v. Adamson</i> , 2 Stark. 422	417
<i>Shea v. Boston & Maine Railroad</i> , 154 Mass. 31	535	— <i>v. South Devon Railway</i> , 9 Hare, 813	393
— <i>v. Glendale Elastic Fabrics Co.</i> 102 Mass. 468	347, 384, 463	<i>Stevenson v. Erskine</i> , 99 Mass. 367	350
<i>Shenandoah Valley Railroad v. Miller</i> , 80 Va. 821	594	— <i>v. Watson</i> , 4 C. P. D. 148	154
<i>Shepard v. Boston & Maine Railroad</i> , 158 Mass. 174	186	<i>Stewart v. Loring</i> , 5 Allen, 306	401
— <i>v. Creamer</i> , 160 Mass. 496	470	<i>Stockwell v. Silloway</i> , 100 Mass. 287	16
<i>Sherman v. New Bedford Five Cents Savings Bank</i> , 138 Mass. 581	457	<i>Stone v. Cartwright</i> , 6 T. R. 411	470
<i>Short v. Currier</i> , 153 Mass. 182	417	— <i>v. Hubbardston</i> , 100 Mass. 49	485
<i>Shultz v. Johnson</i> , 5 B. Mon. (Ky.) 497	401	— <i>v. Lahey</i> , 133 Mass. 426	38
<i>Shurtleff v. Parker</i> , 130 Mass. 293	509	<i>Storey v. Ashton</i> , L. R. 4 Q. B. 476	321
<i>Simes v. Rockwell</i> , 156 Mass. 372	510	<i>Stowell v. Buswell</i> , 135 Mass. 340	491
<i>Skillings v. Massachusetts Benefit Association</i> , 146 Mass. 217	100	<i>Street v. Holyoke</i> , 105 Mass. 82	250
<i>Sly v. Hunt</i> , 159 Mass. 151	218	<i>Strong v. Jackson</i> , 123 Mass. 60	75
<i>Smethurst v. Barton Square Church</i> , 148 Mass. 261	333	— <i>v. Strong</i> , 9 Cush. 560	153
<i>Smith v. Ayer</i> , 101 U. S. 320	402	<i>Sturge v. Eastern Union Railway</i> , 7 DeG., M. & G. 158	393
— <i>v. Boston</i> , 7 Cush. 254	172	<i>Sturtevant v. Wallack</i> , 141 Mass. 119	592
— <i>v. Boston Gas Light Co.</i> 129 Mass. 318	541	<i>Sussdorff v. Schmidt</i> , 55 N. Y. 819	250
— <i>v. Collins</i> , 115 Mass. 388	532	<i>Swan v. Tappan</i> , 5 Cush. 104	132
— <i>v. Green</i> , 1 C. P. D. 92	299	<i>Sweeney v. Boston Five Cents Savings Bank</i> , 116 Mass. 384	457
— <i>v. Hale</i> , 158 Mass. 178	37	<i>Sweetser v. Bates</i> , 117 Mass. 466	325, 519
— <i>v. Livingston</i> , 111 Mass. 342	75	<i>Swift, In re</i> , 137 N. Y. 77	119
— <i>v. Niagara Ins. Co.</i> 60 Vt. 682	482	<i>Taft v. Hartford, Providence, & Fishkill Railroad</i> , 8 R. I. 310	390
— <i>v. Palmer</i> , 6 Cush. 513	352, 554	<i>Tarbell v. Vermont Ins. Co.</i> 63 Vt. 53	482
— <i>v. Rogers</i> , 24 Kans. 140	376	<i>Tarry v. Ashton</i> , 1 Q. B. D. 314	333
— <i>v. Wildes</i> , 143 Mass. 566	403	<i>Tateum v. Ross</i> , 150 Mass. 440	101
<i>Smythe v. Sprague</i> , 149 Mass. 310	61	<i>Thacher v. Williams</i> , 14 Gray, 324	22
<i>Snyder v. Hannibal & St. Joseph Railroad</i> , 60 Mo. 413	321	<i>Thain v. Old Colony Railroad</i> , 161 Mass. 363	289
<i>Somers v. Kellher</i> , 115 Mass. 165	563	<i>Thayer v. Wild</i> , 107 Mass. 449	532
<i>Spalding v. Ross</i> , 71 N. Y. 40	401	<i>Thompson v. Bell</i> , 10 Exch. 10	140
<i>Sparhawk v. Sparhawk</i> , 116 Mass. 315	452	— <i>v. Goulding</i> , 5 Allen, 81	453
<i>Spellman v. Chicopee</i> , 181 Mass. 443	260	— <i>v. Guyon</i> , 5 Sim. 65	104
<i>Spring v. Hyde Park</i> , 137 Mass. 554	179	<i>Thoms v. Dingley</i> , 70 Maine, 100	299
<i>Spring Co. v. Knowlton</i> , 103 U. S. 49	140	<i>Thyng v. Fitchburg Railroad</i> , 156 Mass. 13	551
		<i>Tiffin v. McCormack</i> , 34 Ohio St. 638	384
		<i>Tombs v. Alexander</i> , 101 Mass. 255	250
		<i>Topping v. Bickford</i> , 4 Allen, 120	554
		<i>Towle v. Swasey</i> , 106 Mass. 100	59
		<i>Tracy v. Maloney</i> , 105 Mass. 90	20
		<i>Train v. Kendall</i> , 137 Mass. 366	191
		<i>Trask v. Wheeler</i> , 7 Allen, 109	448
		<i>Tucker v. Massachusetts Central Railroad</i> , 118 Mass. 546	557

Tullis v. Jackson, [1892] 3 Ch. 441	155	Whitehead & Atherton Machine Co. v. Ryder, 139 Mass. 386	299
Tunney v. Midland Railway, L. R. 1 C. P. 291	71	Whitman v. Groveland, 131 Mass. 553	337
Tuttle v. Cooper, 5 Pick. 414	532	Whittier Machine Co. v. Graffam, 156 Mass. 415	51
—— v. Detroit, Grand Haven, & Milwaukee Railway, 122 U. S. 189	289	Wiggin v. Lewis, 12 Cush. 486	532
Twombly v. Monroe, 136 Mass. 464	38	—— v. Plumer, 31 N. H. 261	324
Tyler v. Old Colony Railroad, 157 Mass. 336	473	—— v. Swett, 6 Met. 194	235
Tyndale v. Old Colony Railroad, 156 Mass. 503	551	Wiley v. Athol, 160 Mass. 426	392
Tyson v. State, 28 Md. 577	119	Willard v. Cambridge, 3 Allen, 574	172
Underhill v. Van Cortlandt, 2 Johns. Ch. 339	155	Williams v. Hutchinson, 8 Comst. 812	876
United States v. Robeson, 9 Pet. 319	574	—— v. Parker, 136 Mass. 204	390
Van Horne v. Campbell, 100 N. Y. 287	144	—— v. Sorrell, 4 Ves. 889	78
Vick v. New York Central & Hudson River Railroad, 95 N. Y. 267	71	Williamson v. Cambridge Railroad, 144 Mass. 148	141
Wallace v. Merrimack River Navigation & Express Co. 134 Mass. 95	320	Willingham v. Joyce, 3 Ves. 168	561
—— v. Myers, 38 Fed. Rep. 184	119	Williston v. Michigan Southern & Northern Indiana Railroad, 13 Allen, 400	390
Walter v. Post, 6 Duer, 363	65	Wilson v. New Bedford, 108 Mass. 261	333
Walton v. New York Central Sleeping Car Co. 189 Mass. 566	320	Winchester's case, 3 Co. Rep. 1	476
Ward v. Fletcher, 124 Mass. 224	250	Winchester v. Charter, 97 Mass. 140	324
—— v. Shallet, 2 Ves. Sen. 16	28	Wolbrecht v. Baumgarten, 26 Ill. 291	399
Warlow v. Harrison, 1 El. & El. 295	567	Wolcott v. Winchester, 15 Gray, 461	62
Warner v. Holyoke, 112 Mass. 362	198	Wood v. Boyd, 145 Mass. 176	229
Wasson v. Bowman, 117 Mass. 91	528	—— v. Seaver, 158 Mass. 411	450
Watts v. Watts, 160 Mass. 464	175, 352	Woodbury v. Freeland, 16 Gray, 106	478
Webster v. Lowell, 2 Allen, 123	526	Woodman v. Francis, 14 Allen, 198	179
Weekes v. Gallard, 21 L. T. (N. S.) 655	155	—— v. Metropolitan Railroad, 149 Mass. 386	408
Wellington v. Apthorp, 145 Mass. 69	509	Woods v. Naumkeag Steam Cotton Co. 134 Mass. 357	272
—— v. Downer Kerosene Oil Co. 104 Mass. 64	299	—— v. Woods, 127 Mass. 141	595
Wells v. Calnan, 107 Mass. 514	401	Woodward v. Leavitt, 107 Mass. 453	324
Welsh v. Woodbury, 144 Mass. 542	144	Wooley v. Grand Street & Newtown Railroad, 83 N. Y. 121	345
Western Railroad v. Babcock, 6 Met. 346	154	Workman v. Workman, 2 Allen, 472	450
Wharton v. Lewis, 1 C. & P. 529	419	Wright v. Pohls, 88 Wis. 560	594
Wheeler v. Guild, 20 Pick. 545	79	Wylie v. Marine National Bank, 61 N. Y. 416	250
Whitcher v. Shattuck, 3 Allen, 319	325	Yerrington v. Greene, 7 R. I. 589	401
White v. Boston & Providence Railroad, 6 Cush. 420	84	York v. Pease, 2 Gray, 282	311
—— v. Franklin Bank, 22 Pick. 181	140	Young v. Murphy, 3 Bing. N. C. 54	416
—— v. Moseley, 8 Pick. 356	299	—— v. South Boston Ice Co. 150 Mass. 527	320
		Ziegler v. First National Bank of Allentown, 93 Penn. St. 393	140

CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

ALFRED HOPCRAFT *vs.* WILLIAM P. KITTEDGE & another.

Suffolk. January 10, 11, 1894. — June 23, 1894.

Present: FIELD, C. J., ALLEN, MORTON, & BARKER, JJ.

Contract in Correspondence — Request for Rulings — Questions for Jury — Approval of Offer — General Objection to Rulings — Instructions on the Facts — Motion for New Trial — Affidavits.

In an action of contract to recover damages for the refusal to receive and pay for one hundred thousand advertising cards, fifty thousand G. C. and fifty thousand C. B., subject to approval of a sketch and of the first thousand of each, and of which one thousand of each had been sent to the defendant, it appeared that there was much correspondence between the parties, and also conversation and correspondence between the defendant and an agent of the plaintiff. One of the defendant's letters stated that the C. B. were right, but the delay in sending the G. C. was not right, and the defendant asked how long he must wait for the C. B. *Held*, that the judge properly left it to the jury to find upon the correspondence and conversation in connection with the other testimony in the case what the fact was in regard to the defendant having approved or disapproved of the cards, and that he properly refused to rule that there was "no approval of the G. C. one thousand in any of the letters, or of the C. B. one thousand." *Held, also*, that an exception "as to that portion of the charge as to the cards being sent for approval" was too general, and that the attention of the judge should have been called specifically to the particulars in which the defendant was aggrieved. If a judge instructs the jury fully, clearly, and fairly on the different matters involved in the trial and to which the testimony related, and dwells upon them no more than is necessary properly to discriminate and explain them for the benefit of the jury, it cannot be said that he instructed the jury on the facts.

A new trial will not ordinarily be granted on the ground of newly discovered evidence which goes only to impeach the credit of a witness at the trial; and where affidavits are offered for the purpose of showing a conspiracy between the plaintiff and a witness for him to testify falsely, the question of conspiracy is one of fact for the court.

On a motion for a new trial, a paper alleged to be a copy of an affidavit of a witness at the trial, which does not purport to have been signed or sworn to by him, may properly be rejected, and it is within the discretion of the judge to reject an affidavit as filed too late, and to refuse to allow a motion for a new trial to be amended so as to include the affidavit, and his discretion is not reviewable in this court, the circumstances not being fully disclosed.

On a motion for a new trial, an interrogatory to a deponent, as to whether certain statements in an affidavit of a person taken in the case were true, is properly excluded, and requests resting on the interrogatory and the excluded affidavit are rightly refused.

CONTRACT, by the plaintiff, who was a manufacturer of advertising show cards in New York, against the defendants, who were wholesale dealers in cigars in Boston, to recover damages for the refusal to order, receive, and pay for one hundred thousand advertising cards. At the trial in the Superior Court, before *Bond, J.*, there was evidence tending to show that the cards were of two kinds, called respectively Golden Cloud and Council Brand, upon each of which there was a sketch or picture, the names of the two brands of cigars, Golden Cloud and Council Brand, and the prices of the cigars, and that the cards were intended to be put in boxes exhibited in retail stores, for the purpose of advertising the brands.

There was evidence tending to show that one Slade, who was the travelling salesman and soliciting agent of the plaintiff, and who had authority to procure orders and sell goods subject to the approval of the plaintiff, on or about May 29, 1888, called upon the defendants in Boston to solicit them to purchase some of the plaintiff's advertising cards. A letter dated May 29, 1888, was thereupon drawn up by Slade, signed by the defendants, and handed to Slade, who forwarded it to the plaintiff. The following are copies of this, and also of a letter dated July 6, 1888, from the defendants to the plaintiff. There was much other correspondence which it is not necessary to set out.

Defendants to plaintiff: "Boston, May 29, 1888. I will take 50 M. each of the Golden Cloud and the Council Brand, reduced in size as per instructions at the following price: \$22 and \$24 per M. respectively, subject of course to approval of the next

sketch and the first 1 M. of each. Deliveries to be divided as afterwards directed."

"Boston, July 6, 1888. Yours of the 5th inst. received. Council Brand cards all right, but the delay in sending Golden Cloud is not right. Please let us know when they will be sent, and if not very soon, we cannot wait. How long must we wait for Council Brand?"

There was evidence tending to show that, after the receipt by the plaintiff of the order of May 29, he prepared several pencil sketches of the cards, submitted them to the defendants, and that the sketches were approved by the defendants; that thereupon the plaintiff caused dies to be engraved, and proofs of cards were sent to the defendants, and the plaintiff purchased cardboard and cut the same into the required sizes, bevelled and gilded the cards, and printed one thousand of each of said kinds of cards, and delivered the same to the defendants on or before July 9, 1888.

Slade testified that, shortly after the delivery of the two thousand cards, he called on the defendants in Boston and inquired whether or not the two thousand cards were satisfactory, and was informed by one of the defendants that the cards were satisfactory and all right. He further testified that, some time about the last of July, 1888, he again called upon the defendants and requested them to give an order for the rest of the cards; that W. P. Kittredge then stated to him that he, Kittredge, was going out of town for a short time, and upon his return would attend to the matter and give an order for the balance of the cards. Both defendants testified that, on each occasion, W. P. Kittredge told Slade that the two thousand cards would not answer at all, that they were too large, that the trade would not take them, that the cards covered up the cigars in the boxes and were useless, and that he would not approve them; and that they would try to get their customers to use them, and would push the cards with that purpose. Slade also testified that he received no answer, verbal or written, from the defendants to either of his letters to them dated September 17 and November 12, hereafter referred to. W. P. Kittredge also testified that the said letters were verbally answered by him to Slade when he was in Boston shortly after the dates of the letters. It was

admitted that, after the receipt by the defendants of the first two thousand cards, the defendants used some of the cards by placing them in the boxes of cigars which they sent or sold to their customers, and that none of the cards were either returned to the plaintiff or paid for. There was conflicting evidence whether the defendants offered to return the unused portion of the cards. Both defendants testified that such use of the cards was with the knowledge and consent of Slade. There was evidence that the plaintiff was at all times in readiness to manufacture and deliver to the defendants the balance of the one hundred thousand cards.

In the letter of September 17 from Slade, he asked them to give directions to go on as to the C. B. and G. C. cards, and called their attention to the fact that they had expressed themselves as satisfied with the first thousand of each. In that of November 12 he repeated that they had approved the cards and the sample thousand of each.

At the close of the evidence, the defendants asked for the following instructions, among others: "3. That there is no approval of the cards sufficient to make the defendants liable in the correspondence introduced. 4. That if the jury shall find that the defendants did not approve of the two thousand, in conversation, their verdict must be for the defendants. . . . 6. That there is no approval of the Golden Cloud one thousand in any of the letters, or of Council Brand one thousand."

The judge instructed the jury as follows:

"The plaintiff bases his right to recover upon the order of May 29, 1888, and its acceptance by the plaintiff. . . . It would appear that a sketch had been sent, but was to be changed somewhat, and the agreement to take one hundred thousand cards was to depend upon the approval of the next sketch, and also upon the approval of the first one thousand cards of each kind. It is necessary for the plaintiff to show that on his part he accepted that order for those goods on those terms. It is not necessary that he should show that in so many words he wrote to the defendants, 'I hereby accept the order which I have received from you.' It is enough that he by his act or by his words did accept it, and indicated that acceptance to the defendants. . . . If at the time when this order was given by the

defendants to Slade it was accepted by him as the agent of the plaintiff, and he had authority for that purpose, that is a sufficient acceptance. If the order was received by the plaintiff, and he notified the defendants that he had received it, . . . and then he prepared sketches and sent them in pursuance of the order, and then later prepared an engraved die for printing the cards, then sent on to the defendants what he had done with reference to that, — that was a sufficient notification on the part of the plaintiff to the defendants that he had accepted that order and entered upon the completion of the work that was required of him. . . .

“If you are satisfied with reference to the order and its acceptance, constituting as they do a contract between these parties, there are two things more for the plaintiff to show in this case, and one is that the defendants approved the sketches sent. . . . They were to be approved, and the plaintiff claims that they were sent and approved. . . . It is not necessary that the defendants should have said in so many words, ‘We hereby approve of the sketches that you have sent,’ in any formal way. Any form of words that would indicate that they were satisfied with the sketches would be sufficient; any conduct on their part brought home to the plaintiff or his agent that they were satisfied with the sketches, is a sufficient approval within the meaning of that contract. Was anything said to Slade by the defendants, or either of them? Is there anything in the letters to the plaintiff from the defendants with reference to these sketches, these designs, showing that they were satisfied with them; or, if not satisfied, that they were subsequently changed so that they expressed their approval of them? If there is anything of that kind, the plaintiff has made out that part of his case; and if, after they had received the sketches or the designs, knowing what they were, they ordered them to go on and make the cards from the sketches, or to make the die first, and have that done, that was an approval of the sketch or the design on the part of the defendants. It is necessary that the plaintiff should satisfy you that there was one other thing done by the defendants, and that is that they approved the one thousand cards of each kind that were printed and sent to them by the plaintiff. If they approved the sketch, they

were also to approve the first one thousand cards of each kind. Under that contract the approval was some act of the defendants. The plaintiff is not bound to prove under that contract that these cards were approved by the trade, and by the customers of the defendants. The approval that the contract calls for is the approval of the defendants, or either of them. . . .

“ When they received the cards, they were called upon within a reasonable time to state whether they approved them or not, and if they disapproved them the cards belonged to the plaintiff; they were not the cards of the defendants. What was said with reference to the approval of the sketches is true with reference to this part of the case. . . . It is enough if, by any words or conduct on their part, the defendants signified to the plaintiff or his agent the fact that they were satisfied with these one thousand cards. . . . And inasmuch as it is not necessary that the plaintiff should show that that was done by a formal contract, you may take all the evidence in the case and say whether it satisfies you that at some time after those cards were sent the defendants approved them, — expressed satisfaction with reference to them to the plaintiff or his agent; and if they did, then that is sufficient, so far as that part of the case is concerned.

“ You have a right to consider the situation of the parties at the time when these one thousand cards of each kind came. . . . In the first place, a sketch had been sent which was to give some idea of what was to go on to those cards. . . . Later, if a card was sent, although not finished in every respect like the cards that were to be sent, — the first one thousand cards, — yet a card showing the same things printed from the engraved die, showing how the card was to look, putting it on to a piece of cardboard of the size and the shape intended, putting it on in gilt letters, showing too the quality of the cardboard, the character of the figure, — everything that would show what that card was to be when it was finished, — and the defendants saw it, and after seeing it and knowing how the card was to look when the first one thousand were printed and sent on, they ordered the one thousand cards to be printed and sent on, and they came; is there anything after that showing that they accepted the cards or approved them? The testimony on one side and the other is, in

the first place, with reference to a conversation with Slade, as to which the parties differ. In substance Slade says that they expressed themselves satisfied with the cards; and that they deny. If you could determine just what took place there, that possibly might enable you to determine the whole question. If at that time they said to Slade that they were satisfied with the cards, that is an approval and binds them. They could not afterwards take that back because the trade did not like them, or because they approved them when they had better not. . . .

"I should call your attention to the fact that . . . Slade wrote a letter, in which he refers to the fact that they had, when he had seen them, signified their satisfaction.

"His declaration is not of so much consequence as their conduct with reference to his declaration. When a person makes a statement to another, and the statement calls for some reply, and no reply is made, the jury have a right to infer that the party acquiesces in it. You will examine the letter and see whether, in your judgment, that calls for a reply, if it was not true; whether the defendants, if that was all false, were not called upon to do something; and if they did not make any reply, you will consider whether at that time they considered that it was untrue, — whether their silence was not an admission to that effect. It is not a matter that can be said absolutely to constitute an admission, but it is a circumstance for you to consider whether reasonably, as men ordinarily act, they were called upon to make a reply. If the matter was left until they should have an opportunity to see Slade and then talk it over with him, that might explain the want of a reply. If, as matter of fact, they made a reply, you will have the reply before you and say what it is; but I call your attention to that as bearing upon this question of what was said between the defendants and Slade with reference to the approval of these cards.

"Another class of evidence consists of the letters between the parties. And you will determine from them whether they indicate that these defendants were satisfied, — had approved of the one thousand cards. It is not enough that they approved of the sketch and of the first cards that were sent; both are circumstances to be considered with reference to whether or not they did approve of the cards that were sent like the proof

card. You may consider their letters in view of the situation of the parties. . . . I am not aware that there is any such inconsistency or any such uncertainty in the letters as to call for any statement from me with reference to it, — a direct statement that is easily understood needs no explanation from any one. You can understand what it is. Now, reading over these letters, giving them fair consideration, and trying to ascertain what was in the minds of the defendants here with reference to these one thousand cards, you consider and say, Do they show that they were satisfied with the cards at any time? and if they do, you would infer that they had approved them. . . .

“There is another class of evidence to consider, and that is the retention of the cards and the use of them by the defendants. As I have already said, these cards, if not approved by the defendants, were the property of the plaintiff, and while the defendants would not be called upon to return them to the plaintiff, he would have the right to take them away. If they went on and retained them an unreasonable time, — an unreasonable time with reference to the matter they were retained for, and that is the approval of the cards, — that is evidence of an approval on their part. As to what would amount to a reasonable time, you should consider the opportunity that they had prior to this time to know just what they were to be, the design, the proof cards; they needed an opportunity to look them over and decide whether they were approved or not.

“As to the use of the cards. It is contended by the plaintiff, and not denied by the defendants, that to some extent the cards were used. As I observed with reference to this contract, the approval was not to be the approval of the trade; it was to be the approval of the defendants. The contract does not provide for such a use of the cards for a sufficient length of time for the defendants to determine whether this was going to be a profitable advertising scheme. That was a matter that they should have considered before they made the contract. The approval of the card was an act of these parties when they saw it, that it was like the design that had been sent, that it was in every way according to the style of card that had been represented to them by the proof that was sent, that the printing was in a workmanlike manner, that the quality of the card was suitable;

and every feature of the card which was subject to examination they had a right to examine and then state whether they were satisfied with it or not. Then the cards were not theirs, and if they went on and used the cards, saying nothing about them, their retention of these cards, and their use in the boxes of cigars and sending them out, are evidence of an acceptance and an approval on the defendants' part.

"If you are satisfied on the evidence that this plaintiff accepted this order for the one hundred thousand cards, as I have stated, and if he carried out the contract so far as to furnish the sketch, and that was approved, and furnished the one thousand cards of each kind, and those were approved by these defendants, and the plaintiff has been in readiness at all times to fulfil the contract on his part, then he is entitled to recover here on the arrangement he has shown. If he has not satisfied you of these three things, he is not entitled to recover."

Instructions were also given as to the damages to be recovered.

At the close of the charge the defendants excepted: 1. As to that part of the charge as to the cards being sent for approval. 2. As to that part of the charge as to the letter of Slade; and contended that it did not require a written reply. 3. As to that part of the charge as to the time as it affected the approval, and to the charge as to the use of the cards. 4. That in the charge the judge signified to the jury how he regarded the evidence.

The jury returned a verdict for the plaintiff; and the defendants alleged exceptions.

The defendants moved that the verdict be set aside and a new trial granted on the ground of newly discovered evidence. The motion set out: 1. that the plaintiff testified falsely; 2. that the judgment was recovered by the conspiracy and false testimony of the plaintiff and his witness, Slade; 3. that subsequently to the delivery by the plaintiff to the defendants of the two thousand cards, the plaintiff testified in another action that he had received an order for only one thousand Council Brand cards from the defendants in this action, by which the plaintiff showed the true meaning of the written order of May 29, 1888; and 4. that the two thousand cards were samples, and their retention did not constitute approval.

The motion further stated that the plaintiff's testimony as to the work done by him in relation to the two thousand cards delivered and the ninety-eight thousand cards to be delivered at a cost to him of one thousand dollars was absolutely false, and that such false testimony in connection with the judge's instructions to the jury thereon must have been that on which they founded their verdict; that the newly discovered evidence was contained in affidavits annexed of various parties named; that the fact that the judgment was recovered by the conspiracy and false testimony of the plaintiff and Slade was also shown by affidavits; and that the third proposition was supported by the affidavit of one Edward H. Fallows and the fourth by the affidavit of one Charles W. Mussotter.

The judge overruled the motion for a new trial, and the defendants alleged exceptions, in substance as follows.

The defendants offered a paper alleged to be a copy of an affidavit of John F. Slade, which stated in substance that he was frequently in the plaintiff's factory during the manufacture of the cards, that he saw about 100,000 small cards, identical with those employed in the manufacture of the one thousand Council Brand and the one thousand Golden Cloud, and that the cards were bevelled, gilded, and silvered ready to be stamped, etc. No affidavit of which this paper purported to be a copy was ever filed or offered in evidence in the case by either the plaintiff or the defendants, and the paper did not purport to have been signed or sworn to by Slade. The judge ruled that the paper was inadmissible, and excluded it.

The defendants offered for the same purpose affidavits of Albert Sichel, to the effect that Slade admitted to him that he committed perjury at the trial, and of Charles W. Carroll, that he heard Slade's admission to Sichel. The judge ruled that the affidavits were inadmissible, and excluded them.

The defendants also offered for the same purpose the affidavit of Charles W. Mussotter, which was placed on file several weeks after the motion for a new trial, and affidavits in support thereof were filed, but before the hearing on the motion for a new trial. It was not contended by the defendants that this affidavit was in rebuttal of any affidavits or other evidence offered by the plaintiff on the motion for a new trial, but was offered in support of

the motion. The judge declined to entertain the affidavit, on the ground that it was offered too late. The defendants thereupon moved to amend their motion for a new trial by adding thereto the affidavit of Mussotter, which motion was overruled.

The defendants offered the deposition of one Brennan, the eleventh interrogatory of which was as follows: "Have you seen a copy of what purports to be the affidavit of Edward H. Fallows, taken in this case, dated March 21, and sworn to before a notary? If so, please annex a copy to this answer and state whether the . . . statements therein are true, especially the statements as to the answer of Hopcraft to the original complaint, and whether you told him that such answer was lost?" On objection, the judge excluded the interrogatory.

The defendants further offered the affidavits of Sichel, already referred to, and of J. W. Carroll, for the purpose of proving certain statements made by Slade after the trial, and the judge ruled that the affidavits were not admissible for such purpose.

The defendants asked the judge to rule as follows: 1. If the court shall believe that the plaintiff did not use, bevel, or gild the ninety-eight thousand cards, then, under the instructions given at the trial, the verdict must be set aside, because the evidence upon which the jury must have found their verdict was false. 2. If the court believes as aforesaid, the proper instructions to the jury would have been to deduct from the amount of damages the cost of the cardboard for 98,000 cards and the labor for cutting, gilding, and bevelling the same, and the proper amount would have been the loss of profits. The judge declined so to rule.

A. Hemenway & L. M. Child, for the defendants.

E. B. Hale, for the plaintiff.

MORTON, J. Most of the exceptions that were taken to the refusal of the presiding justice to instruct the jury as requested by the defendants have not been argued by them, and we therefore treat them as waived. Of the others it may be said generally that they dealt with partial views of the testimony, and were properly refused. The third and fourth requests assumed that the defendants were not liable if the correspondence did not contain a sufficient approval by them, or if the jury could not find in the conversation evidence that they had approved the

two thousand cards. But it was for the jury to find, upon all the evidence, whether the defendants had given their approval. The court properly submitted the correspondence to the jury, and left it to them to determine upon it, in connection with all the other testimony in the case, what the fact was in regard to the defendants having approved or disapproved of the cards, and we discover no error in the instructions on this point.

The sixth request for instructions, the only remaining one that has been argued, was to the effect that there was no approval of the Golden Cloud one thousand or of the Council Brand one thousand in any of the letters. In view of the letter of July 6, 1888, we do not see how the request would have corresponded with the fact. Furthermore, the defendants had no right to select a part of the testimony and require the court to rule upon that, to the exclusion of other testimony bearing on the same point. *Commonwealth v. Gavin*, 148 Mass. 449, 451. *Neff v. Wellesley*, 148 Mass. 487, 495.

The defendants also excepted to some portions of the charge. The first exception which has been argued was "as to that portion of the charge as to the cards being sent for approval." In the first place, the objection is too general. If the defendants were aggrieved by anything which the presiding justice had said or omitted to say regarding the matter of approval, they should have called his attention to it specifically. *Hamilton Woollen Co. v. Goodrich*, 6 Allen, 191, 200. *Dwyer v. Fuller*, 144 Mass. 420. *Commonwealth v. Quinn*, 150 Mass. 401, 405. We think also that the instructions were correct. As nearly as we understand the remaining exception to the charge which the defendants have argued, it is that the court charged upon the facts. We do not think the charge is open to that objection. The court instructed the jury fully and clearly and fairly in regard to the different matters involved in the trial, and to which the testimony related, and dwelt upon them no more than was necessary properly to discriminate and explain them for the benefit of the jury. *Durant v. Burt*, 98 Mass. 161, 168.

After the verdict for the plaintiff, the defendants filed a motion for a new trial, which was heard and denied. The case also comes here on exceptions to rulings made by the presiding justice in regard to certain affidavits which were offered by the

defendants at the hearing and rejected by the court, and to its refusal to rule according to two requests presented by the defendants. So far as the affidavits were offered for the purpose of showing that Slade had testified falsely at the trial, they were incompetent. It is settled that a new trial will not ordinarily be granted on the ground of newly discovered evidence which goes only to impeach the credit of a witness at the trial. *Duryee v. Dennison*, 5 Johns. 248. *Harrington v. Bigelow*, 2 Denio, 109. *Hammond v. Wadhams*, 5 Mass. 353. *Commonwealth v. Green*, 17 Mass. 515, 525. *Hilliard*, New Trials, (2d ed.) 505.

Whether the affidavits tended to show conspiracy between the plaintiff and Slade was a question of fact for the justice to pass upon and consider. It cannot be said, as matter of law, that they established it. It is to be further observed that the paper which was alleged to be a copy of an affidavit by Slade did not purport to have been signed or sworn to by him, and might properly have been rejected, because a copy was not under the circumstances admissible. We cannot say that the rejection of the Mussotter affidavit was erroneous. It was excluded by the justice because in his judgment it was offered too late. The circumstances are not stated with sufficient fulness, even if reviewable here, to enable us to determine whether the discretion of the justice was or was not properly exercised. The same is true of the motion by the defendants to amend their motion for a new trial. The interrogatory to Brennan was rightly excluded. Brennan's statements as to the contents of the Fallows affidavit would have been hearsay. Besides, it does not fairly appear what the answer would have been. *Crowley v. Appleton*, 148 Mass. 98. The rulings requested by the defendants rested upon the affidavits and the interrogatory to Brennan, and, those having been rightly excluded, there was no basis on which the rulings could rest, and they were therefore properly refused.

Exceptions overruled.

B. MORRILL NOYES vs. WILLIAM E. MANNING.

Suffolk. January 15, 1894. — June 23, 1894.

Present: FIELD, C. J., ALLEN, MORTON, & BARKER, JJ.

Poor Debtor — Charges of Fraud — Specification of Charges — Arrest of Judgment — Appeal — Authority of Assistant Clerk of Municipal Court of the City of Boston.

The question of the authority of the assistant clerks of the Municipal Court of the city of Boston to issue executions, and to sign orders and certificates made by that court, cannot be raised for the first time at the argument in this court of an appeal from an order of the Superior Court overruling a motion in arrest of judgment upon a conviction there of a charge of fraud filed in poor debtor proceedings in which that question has not been included.

An appeal from an order of the Superior Court overruling a motion in arrest of judgment brings up as matter of law only the question of the correctness of the ruling as made upon the motion that was filed.

Upon an application by a judgment debtor to take the oath for the relief of poor debtors he was arrested on a charge of fraud, filed by the creditor under Pub. Sts. c. 162, § 17, cl. 5, which charge was as follows: "And now comes the creditor in the above entitled action and says that the action (upon which execution in said case was issued and the said debtor arrested) 'was founded on contract, that the debtor contracted the debt with an intention not to pay the same.'" The charges were signed and sworn to as required by the statutes. *Held*, that the action to which the poor debtor proceedings related, and the charge referred, furnished the debtor with all the information that he required.

Poor debtor proceedings are in their main features of a civil, and not of a criminal nature, though if a debtor is found guilty upon a charge of fraud he may be imprisoned.

When a charge of fraud filed by a judgment creditor in poor debtor proceedings does not by reference to the action or otherwise furnish the particulars necessary to enable the debtor clearly to understand of what he is accused, the creditor may be required to file specifications, and if he fails so to do, the charge may be quashed if seasonable objection is made.

APPEAL from an order of the Superior Court overruling a motion in arrest of judgment, which, it was agreed at the argument in this court, was filed after the former decision, reported 159 Mass. 446, when the defendant was brought up for sentence upon conviction of the charge of fraud filed against him by the plaintiff under Pub. Sts. c. 162, § 17, cl. 5, upon his application to take the oath for the relief of poor debtors.

The motion in arrest of judgment alleged that the charge of fraud did not set forth the supposed fraud fully, plainly, clearly,

and formally, as the law requires; that it did not set forth the contract referred to therein, nor the names of the parties, nor any particulars with reference to the contract, its nature or terms, or the liability of the defendant under it, or anything intended or calculated to inform the defendant of what he was to meet or defend; that there was no allegation of the time when the alleged intention was formed, or when the alleged contract was made; that the creditor was nonsuited in the Superior Court before judgment, and that the alleged charge was wholly insufficient, vague, and indefinite, and disclosed no jurisdiction of the court.

The charge of fraud upon which the defendant was arrested was as follows: "And now comes the creditor in the above entitled action and says that the action (upon which execution in said case was issued and the said debtor arrested) 'was founded on contract, that the debtor contracted the debt with an intention not to pay the same.'" The charge was signed by the plaintiff, and was signed and sworn to as required by the statutes, and the certificate, the original execution, and the notice to the judgment debtors were signed by an assistant clerk of that court. At the argument in this court the objection that the plaintiff was nonsuited in the Superior Court before judgment was waived.

P. J. Casey, for the defendant.

J. J. Feely, for the plaintiff.

MORTON, J. The principal question which is discussed by the defendant in his brief relates to the authority of the assistant clerks of the Municipal Court of the city of Boston to issue executions and sign orders and certificates made by that court. It is enough to say of this question, that it is not included in the motion in arrest, and cannot be raised for the first time at the argument in this court. The appeal brings up as matter of law only the question of the correctness of the ruling as made upon the motion that was filed.

The substance of the motion in arrest is that the charge of fraud on which the defendant was tried and found guilty does not set out the fraud with such clearness and formality as the law requires, but is vague, indefinite, and insufficient in regard to the nature of the contract, the parties, and other particulars

necessary, it is alleged, to inform the defendant what he is to meet. The charge on which the defendant was arrested was the fifth contained in Pub. Sts. c. 162, § 17, and was made as follows: "And now comes the creditor in the above entitled action, and says that the action (upon which execution in said case was issued and the said debtor arrested) 'was founded on contract, that the debtor contracted the debt with an intention not to pay the same.'" This was signed and sworn to as required by the statutes. It is to be observed that the substantive part of the charge was in the precise words of the statute. It is assumed in *Chamberlain v. Hoogs*, 1 Gray, 172, and in *Frost's case*, 127 Mass. 550, 554, that that may be sufficient, especially if there is no objection to it. Poor debtor proceedings are in their main features of a civil, and not of a criminal nature, though if a debtor is found guilty upon a charge of fraud he may be imprisoned. *Everett v. Henderson*, 150 Mass. 411. *Parker v. Page*, 4 Gray, 533. *Stockwell v. Silloway*, 100 Mass. 287. *Leonard v. Bolton*, 153 Mass. 428. *Noyes v. Manning*, 159 Mass. 446. When the charge does not, by reference to the action or otherwise, furnish the particulars necessary to enable the debtor clearly to understand what he is accused of, the creditor may be required to file specifications, and if he fails so to do the charge perhaps could be quashed if seasonably objected to. *Frost's case*, 127 Mass. 550, 554. In this case the action to which the poor debtor proceedings related and the charge referred seems to have furnished the debtor with all the information that he required, and the sufficiency of the charge was not objected to till after the verdict, and when the defendant was brought up for sentence.

Order overruling motion in arrest of judgment affirmed.

CHARLES A. STEARNS vs. CHARLES H. HEMENWAY
& others.

SAME vs. SAME.

Suffolk. January 17, 1894. — June 23, 1894.

Present: FIELD, C. J., ALLEN, MORTON, & BARKER, JJ.

*Poor Debtor — Recognizance — Joinder of Two Defendants in one Citation
— Statute.*

In an action against the sureties upon a poor debtor's recognizance, it is not necessary that the declaration should show that any citation was served upon the principal defendant when annexed to it are copies of the execution, the creditor's affidavit upon his application for the arrest of the debtor, and the certificate of the court stating "that it appears from the evidence before the said court that said debtor has been duly notified to appear before the said court for examination," for this imports that notice has been given, and it must be taken as true.

Execution was obtained against two defendants, and upon the application of the judgment creditor for the arrest of one of them he made affidavit that "the debtors named in said execution have property not exempt from being taken on execution which they do not intend to apply" to the payment of the judgment. The certificate having stated that the "court is satisfied there is reasonable cause to believe that the charges made in the foregoing affidavit are true," certified that "said debtor has been duly notified to appear before the said court for examination." *Held*, that the word "debtors" in the affidavit should be regarded as having been used in a distributive sense, and should be construed as if it read "the debtors named in said execution have each property," etc., and that the words "said debtor" in the certificate, which is to be considered in connection with the affidavit, should be construed as if they read "each said debtor," or "each debtor aforesaid."

In poor debtor proceedings two defendants may be joined in one citation.

A poor debtor recognizance requiring the principal defendant to deliver himself up "for examination before some magistrate authorized to act" is to be construed as if it required the debtor to deliver himself up for examination before some court or magistrate named in St. 1888, c. 419.

TWO ACTIONS OF CONTRACT on poor debtors' recognizances. The first one was entered into on March 2, 1898, by Porter A. Underwood as principal, and the defendants as sureties. The second one was entered into on the same day by Hosea W. Leach as principal, and the defendants as sureties. The pleadings and all the subsequent proceedings are alike in the two cases, the same questions are presented in both, and they were argued together.

The declaration in the first case alleged, in substance, the recovery of a judgment by the plaintiff in the Superior Court against Hosea W. Leach and Porter A. Underwood, upon which execution was duly issued and returned unsatisfied; that an alias execution was duly issued, and that one Ralph S. Bartlett, on behalf of the judgment creditor, appeared before the Third District Court of Eastern Middlesex for civil business, and made affidavit as required by statute, and that the clerk of the court affixed the affidavit to the execution, together with a certificate of the court authorizing the arrest of Hosea W. Leach and Porter A. Underwood; that on March 2, 1893, Porter A. Underwood was by virtue of the execution arrested and taken before a magistrate, where he recognized, with the defendants as sureties, for his appearance within thirty days to submit himself to an examination before some magistrate authorized to act in such cases, first giving the judgment creditor notice of the time and place of the examination, and also of his desire to take the oath for the relief of poor debtors; that the defendant Underwood did not appear and submit himself to an examination according to the terms of said recognizance, but wholly failed to fulfil the conditions thereof, whereby a right of action has accrued to the plaintiff to recover from the defendants the amount of the penal sum named in the recognizance.

The second count alleged that the defendants, with one Porter A. Underwood, entered into a recognizance; that Underwood did not within thirty days from the time of his arrest, as mentioned in the recognizance, deliver himself up for examination before some magistrate authorized to act, giving notice of the time and place thereof in the manner provided by Pub. Sts. c. 162, and the acts amendatory thereof and supplementary thereto, nor did he in any other respect keep or perform the conditions of the recognizance; wherefore the defendants owe the plaintiff the amount of the recognizance.

Annexed to the declaration was a copy of the execution, which directed the officer to levy upon "the goods, chattels, or lands of the said judgment debtors," and a copy of the affidavit of one Ralph S. Bartlett, who, on behalf of the judgment creditor, made oath that "the debtors named in said execution have property not exempt from being taken on execution, which they

do not intend to apply to the payment" of the judgment. The certificate of the court, which was also annexed to the declaration, stated that "after due hearing the said court is satisfied there is reasonable cause to believe that the charges made in the foregoing affidavit are true; this also certifies that it appears from the evidence before the said court that said debtor has been duly notified to appear before the said court for examination, . . . and has neglected and refused so to appear."

The condition of the recognizance was "that the said Porter A. Underwood, within thirty days from the time of his arrest, as above mentioned, will deliver himself up for examination before some magistrate authorized to act, giving notice of the time and place thereof in the manner provided" in Pub. Sts. c. 162, and the acts amendatory thereof and supplementary thereto, "and appear at the time fixed for his examination, and from time to time, until the same is concluded, and not depart without leave of the magistrate, making no default at any time fixed for his examination, and abide the final order of the magistrate thereon."

The defendants demurred to the declaration, and assigned as grounds of the demurrer: 1. That it set forth no cause of action. 2. That it did not show that the magistrate purporting to take the recognizance had jurisdiction to take it. 3. That it did not show that any judgment was rendered against the principal in said recognizance by any court having jurisdiction in the premises, or that such other proceedings were taken as to authorize the taking of any recognizance.

The Superior Court overruled the demurrer in both cases, and ordered judgment for the plaintiff for the amount of the recognizance; and the defendants appealed to this court.

W. C. Cogswell, for the defendants.

A. H. Russell, for the plaintiff.

MORTON, J. In these two cases the defendants demurred to the declarations. After a full hearing in the Superior Court, the demurrers were overruled, and judgment ordered in each case for the plaintiff for the amount of the recognizance. Thereupon the defendants appealed to this court. The same questions are presented in the two cases, and they were argued together.

1. The defendants object, in the first place, that the declaration does not show that any citation was served upon the principal defendants, either before or after the making of the affidavits, and that the certificates authorizing the arrests and the recognizances were therefore invalid. Copies of the original and alias executions, and of the affidavits and certificates, are annexed to and form parts of the declaration in each case. From these it appears that application for the arrests was made to the Third District Court of Eastern Middlesex for civil business. In the certificates authorizing the arrest it is stated "that it appears from the evidence before the said court that said debtor has been duly notified to appear before the said court for examination, as provided in chapter 162 of the Public Statutes and the acts amendatory thereof and supplementary thereto." This imports that notice had been given, and must be taken as true. *Tracy v. Maloney*, 105 Mass. 90.

2. In the next place, the defendants object that the affidavit charges that the debtors jointly have property "which they do not intend to apply," etc. But we think the more natural construction is to take the affidavit as if it read, "that the debtors named in said execution have each property," etc., and that the words should be regarded as having been used in a distributive sense. We do not mean to intimate that, if the other were the more natural construction, the affidavit would be defective. The execution directs the officer to levy upon "the goods, chattels, or lands of the said judgment debtors," but the separate property of either may be taken, showing that there a similar arrangement of words is distributive.

3. The defendants object to the certificate for a reason precisely opposite to that which they urge against the affidavit. They object that the word "debtor" is used, and not the word "debtors," and contend that it is entirely uncertain which debtor is meant, and whose arrest is authorized. The certificate is to be considered in connection with the affidavit. The affidavit uses the plural, though, as we have seen, it is to be construed distributively. The first sentence in the certificate sets out that the "court is satisfied there is reasonable cause to believe that the charges made in the foregoing affidavit are true," meaning that the charges are true as to each debtor.

There is no ground for supposing that the court did not mean the certificate to apply in all its parts to each debtor; and we think it fairly may be construed as if it read that "each said debtor" or "each debtor aforesaid" "has been duly notified, . . . and has neglected and refused so to appear." It is apparent that the error was a clerical one, due probably to the use of printed blanks. This is rendered the more probable from the fact that the same errors occur in both certificates. See *Abbott v. Tucker*, 4 Allen, 72; *Hill v. Bartlett*, 124 Mass. 399; *Foster v. Leach*, 160 Mass. 418.

In *Hitchcock v. Baker*, 2 Allen, 431, only one defendant was referred to in the affidavit, and it was entirely uncertain which one was meant.

4. The defendants further object that the two principal defendants could not be joined in one citation. We have not been referred to any statute which forbids it, or any authority against its being done, and we discover nothing in the nature of the proceedings which should prevent it. In *Pierce v. Phillips*, 101 Mass. 313, a citation issued in the name of two judgment debtors to two judgment creditors, and no objection seems to have been taken. We do not see why judgment debtors may not be joined in poor debtor proceedings, as well as in the execution or in the original writ. The rights of the debtors are not prejudiced thereby. Each is served with notice, and the oath is administered or refused, or he is found guilty or not, according as the facts after due examination in his case warrant, and not otherwise.

5. Lastly, it is objected that the recognizances are void because the principal defendants were required to deliver themselves up "for examination before some magistrate authorized to act," etc. It is contended that they should have been recognized to deliver themselves up "before some court of record, or police, district, or municipal court, or, except in the county of Suffolk, before some trial justice." It is expressly provided in the act amending the Public Statutes that where the word magistrate occurs in any section it shall be construed to mean "magistrate or court." St. 1888, c. 419, § 12. The same meaning is to be given to it in these recognizances. They are to be read, therefore, as if they were written, will deliver himself up "before some court or magistrate authorized to act," which

plainly would be sufficient. The recognizances refer in terms, not only to the public statutes, but to the acts in amendment thereof, and it was the duty of the defendants under the recognizances to deliver themselves up for examination, within the time limited, before some court or magistrate named in the amendatory act of 1888. *Thacher v. Williams*, 14 Gray, 324. The demurrers admit that they have not done so.

Judgment on the verdict.

CAROLINE CROFT, trustee, petitioner.

Suffolk. January 22, 1894. — June 23, 1894.

Present: FIELD, C. J., ALLEN, MORTON, & BARKER, JJ.

Trust — Will — Intention of Testator — Marriage Portion — Power.

A testator, by his will, gave one hundred thousand dollars in trust, one half of the income thereof to be paid from time to time to his two granddaughters in such sums and at such times as the trustee should in his discretion consider for the best interest of the beneficiaries, and any balance of income that might from time to time remain was to be added to the principal. He then authorized the trustee, if his grandchildren or either of them should be married, at his discretion "to make and pay to them severally and to each of them such sum or sums as he may consider reasonable and proper as an advance or marriage portion from the said principal sum or its accumulations." If either of the granddaughters should decess leaving lawful issue, one half of the principal and its accumulations "less any advance by way of marriage portion which may have been made to such granddaughter" should go to such issue, and if either granddaughter should decess without leaving issue then the sum and its accumulations "less any advance by way of marriage portion which she may have received" was to be held in trust for the surviving grandchild; and if such surviving grandchild should die without leaving issue, the sum and its accumulations were to go to the testator's heirs at law. One of the granddaughters married, and soon afterward the trustee paid to her the sum of five thousand dollars as an advance or portion under the power. *Held*, that the trustee was authorized to make such an advance by way of a marriage portion only; that the testator did not intend that the whole of the principal sum should be so advanced, and that, by the payment of five thousand dollars to the granddaughter who married, the power of the trustee to make an advance as to her by way of marriage portion was exhausted.

PETITION IN EQUITY, filed September 11, 1893, for instructions, and for leave to sell real estate.

The petition alleged that the petitioner was a trustee under the will of Gardner Brewer, deceased, wherein she is called Caroline Abigail Brewer; that under clause thirteen of the will she held a fund in trust for Caroline Amory Lyman, the wife of George H. Lyman, called in the will Caroline Brewer Amory, for life, the fund upon the decease of Caroline Brewer Amory being limited in favor of her issue, and in case of her decease without issue her surviving, in favor of her sister Anna Sears Amory, and in the contingency of Anna Sears Amory dying without issue her surviving, in favor of the heirs at law of the testator; that the heirs at law of the testator at the time of his decease were the petitioner and Mary Elizabeth Penniman, daughters, and Caroline Brewer Amory and Anna Sears Amory, granddaughters; that Caroline Amory Lyman is married and has issue who are minors; that the fund so held for her amounts to about ninety-three thousand dollars, of which a part is invested in a homestead on Clarendon Street in Boston, and occupied by her and her family; that the testator, by his will, gave power to his trustee to give to Caroline Brewer Amory if she should marry an advance or portion; that Caroline Brewer Amory married on April 26, 1881, and soon after her marriage the petitioner gave her the sum of five thousand dollars as an advance or portion under the power, believing that that was all that it was advisable in view of the circumstances of the beneficiary and of the trust then to advance; that by the increase of the trust fund, and from other causes, the circumstances of Caroline Amory Lyman have since then materially changed, and a larger sum may now not unreasonably be given to her, if the power of the petitioner extends thereto. The prayer of the petition was that the petitioner might be authorized to sell the estate on Clarendon Street, and to pay to Caroline Amory Lyman the proceeds thereof, with such additional sum as would make a total advance of fifty thousand dollars.

Caroline Amory Lyman and her husband answered, admitting the allegations of the petition, and saying further that the increase of the fund set apart for her and her issue under clause thirteen of the will was due to the accumulation thereof before her marriage; that no part of the income was paid to her before that time; that the share of the residue which was payable to

her or to her issue upon the death of the testator's daughters under clause nineteen of the will was upwards of two hundred thousand dollars; that the testator's daughters were sixty and sixty-one years of age respectively, and that the value of the estate occupied by the respondents on Clarendon Street was about twenty-three thousand dollars, and the respondents contended that, on the facts stated in the petition and the answer, the trustee might properly make a further advance to Caroline Amory Lyman, and they prayed that the petition might be granted.

The guardian *ad litem* of the minor children of Caroline Amory Lyman answered that the power of the trustee to pay to Caroline Amory Lyman a sum or sums as an advance or marriage portion under clause thirteen of the will had been exhausted by the payment to her on her marriage of the sum of five thousand dollars.

The material portions of the testator's will, which was annexed to and made a part of the answer, are as follows:

"Thirteenth. I give to my daughter Caroline Abigail Brewer the sum of one hundred thousand dollars, to be held by her in trust, nevertheless for the uses and purposes hereinafter expressed, to wit: I direct the said Caroline Abigail Brewer to pay one half of the income which may be derived from the said one hundred thousand dollars, from time to time, to Caroline Brewer Amory, and one half to Anna Sears Amory, children of my deceased daughter Ellen. The payments so to be made to my said granddaughters are to be made at such time or times and in such sum or sums as the said Caroline Abigail Brewer may, in the exercise of her discretion, consider for the best interest of my said grandchildren, without reference to any guardian or husband, or to the control of any guardian or husband, which my said grandchildren, or either of them, may have; the balance of income which may be derived from the said principal sum of one hundred thousand dollars, if any, which the said Caroline Abigail Brewer shall not, in the exercise of her discretion, consider it expedient to distribute, shall from time to time be added to the principal sum. If my said grandchildren, or either of them, shall be married, the said Caroline Abigail Brewer is authorized at her discretion to make and pay to them

severally and to each of them such sum or sums as she may consider reasonable and proper as an advance or marriage portion from the said principal sum or its accumulations. If either of my said grandchildren shall decease, leaving any child or children, her lawful issue, her surviving, then and in such event one half of the said principal sum and its accumulations, less any advance by way of marriage portion which may have been made to such granddaughter, shall go and be paid to her child or children, lawful issue as aforesaid, then living, share and share alike. If the said Caroline Brewer Amory or the said Anna Sears Amory shall decease without lawful issue her surviving, then the said sum and its accumulations, less any advance by way of marriage portion which she may have received, shall thereafter be held in trust by the said Caroline Abigail Brewer exclusively for the surviving grandchild, and if such surviving grandchild shall decease without lawful issue her surviving, the said sum and its accumulations shall go to my heirs at law. . . .

“Fifteenth. I give to my nephew Francis Willard Brewer the sum of one hundred thousand dollars, in trust, to pay the interest and income therefrom . . . to my daughter Mary Elizabeth Penniman, for and during her natural life, as and for her sole and separate estate, free from the marital rights of her present or any future husband. . . . At the decease of my said daughter Mary Elizabeth Penniman, the principal sum to be paid to such person or persons as she may direct and appoint by will or other testamentary paper; if she make no appointment, the said principal sum to be paid to such child or children of the said Mary as shall survive her. And the said Francis Willard Brewer may pay the said one hundred thousand dollars, or any part thereof, so as aforesaid given to him in trust for my daughter Mary, to my daughter Mary during her lifetime, notwithstanding the limitations and restrictions herein contained in relation thereto, if in his judgment such payment shall be required for her personal comfort and support; and thereupon such payment, the said Brewer shall be discharged and released from the trust herein confided to him. . . .

“Nineteenth. At the death of the last survivor of my wife and daughters who may be living at my death, and not sooner, I order and direct that all the residuary trust property and estate

held by my trustee under the provisions of this my will shall be divided into so many equal shares; that there shall be one share for each of my daughters who may survive me, and shall leave lawful issue then living, or who, pursuant to the power herein given, shall have made a testamentary disposition of her share of said trust property, and one share for the lawful issue then living of either of my daughters who may have deceased during my lifetime, including the issue of my deceased daughter Ellen Amory, and I do order and direct that the said shares shall severally be disposed of as follows, that is to say: each and every of my daughters who shall survive me shall have full power and authority by her last will, or any testamentary writing by her subscribed in the presence of three or more witnesses, to direct and appoint to whom one of the aforesaid shares shall be given; but if my said daughters, or either of them, should fail to appoint, then and in such case the share of the daughter so failing shall be divided to and among her lawful issue, in the same proportions in which they would be entitled if my daughter had died seised of the same in her own right; and the share which may have been set apart for the lawful issue then living of a daughter who may have deceased in my lifetime, including my deceased daughter Ellen Amory, shall be divided to and among such issue in the same proportions in which they would have taken the same if such daughter had died seised thereof in her own right."

At the hearing, before *Lathrop, J.*, the parties admitted the facts stated in the petition and answer of Caroline Amory Lyman, and, at their request, the judge reported the case upon the pleadings for the consideration of the full court.

F. V. Balch, for the petitioner, read the papers in the case.

W. G. Russell & J. Fox, for Caroline A. and George H. Lyman.

J. B. Warner, guardian *ad litem* for the minor children of Mrs. Lyman and all persons unborn or unascertained who might have an interest.

MORTON, J. Not much assistance can be derived from authorities in deciding the question which is raised in this case. Indeed, it may be said generally that in considering the obscure provisions which are often found in wills little help is to be

obtained from precedents. Each case depends so much on the peculiar phraseology employed, that it is seldom that the decision in one case throws very much light on that which should be made in another.

By the thirteenth clause of his will, the testator gave to his daughter Caroline one hundred thousand dollars in trust, to pay one half of the income from time to time to Caroline Brewer Amory and Anna Sears Amory, children of his deceased daughter Ellen. The payments were to be made in such sums and at such times as said Caroline should, in the exercise of her discretion, consider for the best interests of said grandchildren, and any balance of income that might remain was from time to time to be added to the principal. Following these provisions comes the one which we are asked to construe: "If my said grandchildren, or either of them, shall be married, the said Caroline Abigail Brewer is authorized at her discretion to make and pay to them severally and to each of them such sum or sums as she may consider reasonable and proper as an advance or marriage portion from the said principal sum or its accumulations"; if either of said grandchildren shall de cease leaving lawful issue, one half of the principal and its accumulations, "less any advance by way of marriage portion which may have been made to such granddaughter," shall go to such issue; if either granddaughter shall de cease without leaving issue, then the said sum and its accumulations, again "less any advance by way of marriage portion which she may have received," is to be held in trust exclusively for the surviving grandchild; and if such surviving grandchild dies without leaving issue, then said sum and its accumulations are to go to the testator's heirs at law. It is apparent, we think, from these provisions that the testator did not contemplate that the whole of the principal sum should be used for marriage portions to the two granddaughters. It is also apparent, we think, that the payment which the trustee is authorized to make to each grandchild is to be by way of marriage portion. Those words describe the character of the advance which the trustee is given power to make. The trustee is not authorized to make payments from time to time to the granddaughters for their support or greater comfort. By marriage portion is commonly understood the property, usually a substantial amount, which a

woman brings with her upon her marriage. *Johnson v. Goss*, 132 Mass. 274. *Ogden v. Ogden*, 1 Bland, 284. *De Young v. De Young*, 6 La. An. 786. Co. Lit. 31 a. 2 Bl. Com. 129. 1 Scribner, Dower, c. 1, § 4. Bouv. Law Dict. Anderson, Law Dict.

No doubt a marriage portion may be so given that payments may be made on account of it from time to time after marriage, and perhaps in some cases the words have been applied to payments made to the wife, or to property brought in by her, after marriage. *Brown v. Jones*, 1 Atk. 188. *Holt v. Holt*, 2 P. Wms. 648. *Ward v. Shallet*, 2 Ves. Sen. 16. *Ramsden v. Hylton*, 2 Ves. Sen. 304. *Colville v. Parker*, Cro. Jac. 158. But that is not the usually accepted meaning. The question, then, is, What did the testator intend in this case? If the words "such sum or sums" are to be read as applying to such granddaughter, the inference would be very strong that the trustee was to have power to pay at once, or from time to time, such amount or amounts as she might deem reasonable and proper by way of a marriage portion. But we think they were intended to cover the case of a payment to one alone, or of a payment to each, rather than successive payments to the same grandchild. In the next sentence the payment which is authorized is spoken of as "any advance by way of marriage portion." And the same expression is repeated in the next, as well as in the concluding sentence of the paragraph. If the testator had had in mind a marriage portion to be paid from time to time, he naturally would have said "any advances by way," etc. Again, under the construction contended for by Mrs. Lyman the trustee would have power if both grandchildren married, and possibly if only one married, to pay over to them by way of advances for marriage portions the entire principal and its accumulations. It is apparent, we think, as already stated, that the testator did not contemplate such a disposition of the fund. It is to be observed further, that it appears from clause fifteen that when the testator wished to give to his trustee the right to pay over the entire principal from time to time to a beneficiary, he manifested his purpose in clear and unmistakable language. Upon the whole, we think that, according to the construction which we feel obliged to give to the will, the power of the trustee to make an advance by way of marriage portion to Mrs. Lyman has been exhausted by the payment that has been made.

However desirable it might be, in view of the changed circumstances of Mrs. Lyman, that the trustee should have the power to make an additional advance to her, it is manifest that that cannot justify us in departing from the will of the testator.

Petition dismissed.

DORA THOMAS vs. COMMERCIAL UNION ASSURANCE
COMPANY, LIMITED.
JOSEPH BENNETT vs. SAME.

Suffolk. March 6, 1894. — June 23, 1894.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Fire Insurance — Apportionment of Entire Contract of Insurance — Misdescription of Structure Insured — "Hotel" and "Dwelling-House" — Evidence — Burden of Proof — Undisclosed Intention — Extrinsic contemporaneous Oral Evidence.

Where but one premium is paid for an insurance against loss by fire on two structures, the contract of insurance is entire, and if void in part is void altogether, and cannot be apportioned.

At the trial of an action on a policy of insurance against loss by fire, in which the property insured was described as a "frame dwelling-house," it appeared that for years previous to its purchase by the assured the structure had been used as a hotel, and was known to the assured, and generally, as the "Glen Hotel," or the "Glen," and at the auction sale in which it was purchased by the assured it was so described in the notice read by the auctioneer, while the number of rooms therein and their arrangement and purposes showed that as it stood, though unoccupied, it was a hotel, and not a dwelling-house. *Held*, that upon these facts it could not be regarded as a dwelling-house when insured, and the mere fact that the assured after purchasing the property put in a care-taker, who slept in one of the rooms, or the undisclosed intention of the assured to let it to a family, did not change the character of the structure.

The description, in a policy of insurance against loss by fire, of a structure as a frame dwelling-house when it is in fact a hotel, is such a misdescription as will avoid the policy.

In an action upon a policy of insurance against loss by fire, the burden of proof is on the assured to show that the property which is the subject of insurance is of the character described in the policy, and it is competent for the insurer to show that it is of a different character, and therefore not the risk which was insured.

At the trial of an action on a policy of insurance against loss by fire, in which the subject of the insurance is described as a "frame dwelling-house," when it is in fact a hotel, testimony offered by the assured of what took place at the issuing of the policy, for the purpose of showing that the property was fully described

to the agent of the insurer, and that the description contained in the policy was his description, was rightly excluded, as, if admitted, it would have tended to vary the written contract.

TWO ACTIONS OF CONTRACT upon a policy of insurance, in the form prescribed by Pub. Sts. c. 119, § 139, insuring the plaintiff Thomas, in consideration of the payment by her to the defendant of the sum of ten dollars and eighty-three cents, against loss by fire for one year from July 14, 1890. The amounts and the property insured were as follows: "\$3,000 on her frame dwelling-house situate on Glen Avenue near Coolidge Avenue, Watertown, Mass.; \$1,000 on her frame private stable situate near the above dwelling." On the face of the policy were the words: "Payable, in case of loss, to Joseph Bennett, mortgagee, as his interest may appear."

The first action was brought by the plaintiff Thomas, in which, by the first two counts of the declaration, she sought to recover the sum of \$1,000 as the excess of the amount of insurance and loss above the amount due upon a mortgage of the premises, and by the third count to recover the entire amount of the insurance.

The second action was brought by Joseph Bennett, the mortgagee of the premises insured, seeking to recover \$3,000, which was the amount due on the mortgage.

Trial in the Superior Court, before *Fessenden, J.*, who allowed a bill of exceptions in substance as follows.

The plaintiff Thomas, on June 5, 1890, bought at auction a parcel of land with a structure and stable thereon situated on Glen Avenue near Coolidge Avenue in Watertown. The structure thereon, which in the policy was described as a frame dwelling-house, had for years, and up to the time of its damage by fire on May 7, 1890, shortly before its purchase by the plaintiff, been used as a small hotel, and was known as the Glen Hotel. It was a frame house about seventy-one feet long and forty feet wide, three stories in height, with a piazza in front, and containing about thirty rooms.

One Gleason testified that he was an auctioneer, and that he sold the property at auction to Mrs. Thomas, on June 5, 1890, and that the advertisement of the sale, which at that time he read in the hearing of Mrs. Thomas, described the premises as

the "Glen Hotel." He further testified, that in 1890 he was an assessor of the town of Watertown, and was familiar with the property in question; that there were on the entrance floor of the house, as he thought, three parlors, a dining-room, reading-room, billiard-room, and bar-room, all of which were numbered; that on the second and third floors there were sleeping rooms, and also on the third floor a large hall in the rear.

The plaintiff Thomas testified that the house was built in 1881; that it was always called the Glen Hotel, or the Glen, usually the Glen; that when she bought it she knew it had been kept as a hotel; that she attended personally at the auction sale on June 5, 1890, and that the auctioneer read a notice of what he was going to sell, which described the property as the "Glen Hotel"; that on the same day on which she bought the property she hired one Egan to take care of the place, who remained there about three months, and slept in one of the rooms; that afterward she let a Mrs. Thornell go into the house, and have the use of it for its care, until it and the stable connected with it were destroyed by fire, on May 30, 1891; that she was going to sell it as soon as she got a chance, and was trying to get a family to let it to so as to get a little out of it; and that in November, 1890, she made repairs on that part of the building which had been burned previously, on May 7, 1890.

It was admitted that there was no written application for insurance, and the plaintiff Thomas offered to show that, at the time the policy was issued, she, the plaintiff Bennett, and the defendant's agent were together at the plaintiff Bennett's office in Boston, and that then the premises were described to the agent, who made out the policy in his own handwriting, and that the description of the premises therein was his; that he was given a general description of the buildings, and was told that the property was formerly known as the Glen Hotel; and that he knew that at the time of the application it was occupied by some one as a care-taker. The plaintiff Bennett testified that he held a mortgage on the property for \$3,000, dated July 14, 1890, which was in force when the buildings were burned in May, 1891.

The defendant introduced the testimony of experts upon insurance rates, who testified substantially that there was an established custom among fire underwriters in Massachusetts to

charge a fixed rate of premium upon detached frame dwelling-houses, and a fixed rate on detached frame hotels, and that the rate on such frame dwelling-houses is from twenty-five cents to thirty-five cents a year on a hundred dollars, and is the lowest rate on any class of frame structures; that the rate upon detached frame hotels is six or eight times as much; that a building built for a hotel, containing parlors and dining-room, bar-room, billiard-room, hall, and other rooms for general purposes, and some ten or twelve bedrooms, which building had been used for a hotel until shortly before the date of the policy and had not been remodelled, would belong to the hotel class; and that if such building had been partly destroyed by fire, and it remained unrepaired up to the issuing of the policy thereafter, and was not occupied except as a watchman stayed in the building to take care of it, the premium would be materially increased, and that the working of carpenters in such a building would further increase the premium.

At the conclusion of the evidence, the judge ruled that the actions could not be maintained, and directed a verdict for the defendant in both actions; and the plaintiffs alleged exceptions.

F. E. Snow & G. D. Burrage, for the plaintiffs.

W. C. Loring, for the defendant.

MORTON, J. The policy upon which these suits are brought was issued to the plaintiff Thomas. The property which was the subject of the insurance is described in the policy as "her frame dwelling-house situated on Glen Avenue near Coolidge Avenue, Watertown, Mass.," and "her frame private stable situated near the above dwelling." There was but one premium paid for the dwelling and stable, and the contract of insurance was an entire one. If it is void in part, it is void altogether, and cannot be apportioned. *Friesmuth v. Agawam Ins. Co.* 10 Cush. 587. *Brown v. People's Ins. Co.* 11 Cush. 280. *Lee v. Howard Ins. Co.* 3 Gray, 588. *Kimball v. Howard Ins. Co.* 8 Gray, 33.

The questions on which the cases principally turn are, first, whether the main building was properly described as a dwelling-house, and, secondly, if not, what is the effect of the misdescription. We think that, upon the undisputed facts, it cannot be regarded as having been a dwelling-house at the time when it

was insured. It was conceded at the trial that the structure had been used for years, and up to the time of its damage by fire shortly before its purchase by the plaintiff, as a small hotel, and was known as the Glen Hotel. The plaintiff Thomas testified that "it was always called the Glen Hotel or the Glen, mostly the Glen," and that at the auction at which she bought the property the notice read by the auctioneer described it as the Glen Hotel. There was no testimony that it had been occupied as a dwelling-house before the issuing of the policy, unless the evidence of the presence of the care-taker, Egan, put in by the plaintiff, constituted such occupancy. The number of rooms in the house, and their arrangement and purposes, showed that it was as it stood a hotel, and not a dwelling-house; and we do not think that the mere fact that the plaintiff immediately after purchasing the property put in a care-taker, who slept in one of the rooms, changed the character of the place from a hotel to a dwelling-house. No doubt the plaintiff could have made a dwelling-house of it, but she did not. She herself says that she was going to sell it as soon as she got a chance, apparently just as it was, if she could. Her undisclosed intention to let it to a family, so as to get a little out of it, did not change the open and visible character of the property.

The property being a hotel, and not a dwelling-house, the next question is how that affects the policy. It is possible that a building, though called a hotel, may be in fact a dwelling-house, and more correctly described as such. But, as already stated, we think that, upon the undisputed facts, this building must be regarded as a hotel. The testimony shows that a hotel risk is different from and more hazardous than a dwelling-house risk. The burden was on the plaintiff to show that the building was a dwelling-house. *Ring v. Phoenix Assurance Co.* 145 Mass. 426. It was competent for the defendant to show that this was a hotel, and therefore not the risk which it insured. It agreed to insure a dwelling-house, and not a hotel. The property which was the subject of insurance was in fact a hotel. The minds of the parties have not met, therefore, and no such contract as the policy purports to express has been entered into; and as the only claim which the plaintiff has upon the defendant is under the policy, it follows that she cannot maintain it.

Gardner v. Lane, 12 Allen, 39. *Goddard v. Monitor Ins. Co.* 108 Mass. 56.

The testimony which was offered by the plaintiffs of what took place at the issuing of the policy for the purpose of showing that the property was fully described to the agent, and that the description contained in the policy was his description, was rightly excluded. If admitted it would have tended to vary the written contract. *Barrett v. Union Ins. Co.* 7 Cush. 175. *Jenkins v. Quincy Ins. Co.* 7 Gray, 370. *McCluskey v. Providence Washington Ins. Co.* 126 Mass. 306. *Batchelder v. Queen Ins. Co.* 135 Mass. 449.

The result is, that the exceptions must be overruled, and it is
So ordered.

THOMAS J. LAMBERT vs. CHARLES H. ROBINSON & another.

Middlesex. March 7, 1894. — June 23, 1894.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Trespass Quare Clausum — Assault — Pleading — License — Right of Entry under Conditional Sale of Personal Property — Excessive Force.

Justification for an assault cannot be shown as a defence under a general denial, but must be pleaded specially.

The plaintiff, under a written lease, hired certain articles of furniture of the defendant, for which he paid as rent the sum of five dollars, and promised to pay the further sum of one dollar a week until he should have paid a specified amount, when the rent was to cease, and the articles were to become his property. The lease provided that, upon any default in the payment of rent, the defendant or his agents might, "without demand or notice, or being deemed guilty of any trespass or tort, and without thereby rendering themselves liable to refund any sums received by them as rent aforesaid, enter any house or place where said articles may be, and take possession of and remove said articles therefrom." It further stipulated that, so long as rent should be payable, the plaintiff would not remove the furniture from the premises described in the lease. *Held*, that the right of the defendant to enter and remove the furniture, which was an irrevocable license, was given only upon a failure to pay rent, and not upon a removal of the furniture, and that there was nothing in the contract which gave to the defendant the right, upon the removal of the furniture by the plaintiff during the continuance of the lease, to demand a settlement of the entire account if the rent was paid as agreed.

A person who has a right to enter upon the land of another may use such force as is required for the purpose without being liable to an action, but if he commits a

breach of the peace he is liable to the Commonwealth, and if he uses excessive force he is liable to a personal action for an assault.

In an action of trespass for breaking and entering the plaintiff's close and for an assault, it appeared that the plaintiff had hired certain furniture of the defendant under a written lease which gave the defendant a license to enter and remove the furniture upon the plaintiff's failure to pay rent, and prohibited the plaintiff, so long as rent was payable, from removing the furniture from the premises described therein; that because of the removal of the furniture by the plaintiff during the continuance of the lease, and because of his failure to settle the entire account on demand, the defendant's servants attempted to enter the plaintiff's house, and that, when one of them knocked at the outside door and it was opened by the plaintiff's daughter, they rushed into the house in a violent manner, throwing the plaintiff's daughter back on the stairs and frightening her; that afterwards one of them went to the rear of the house and opened a window, jumped into the house, and pushed the plaintiff's wife violently against the side of the house; that when the plaintiff came in they were sitting in the parlor; that when he asked them why they were there and what they wanted, and, opening the door, requested them to go out, they made no reply; that he then went to the kitchen and got a rolling-pin and returned into the room where they were, whereupon one of them seized him by the arm and another one wrested the rolling-pin from him and committed the assault. It did not clearly appear from the bill of exceptions that any rent was due at the time of the entry, but it was agreed that there was a balance still unpaid upon the contract. *Held*, that on this evidence it could not be said that there was no evidence of excessive force, and that the ruling requested by the defendant, that his entry was reasonable and proper, and that the plaintiff could not maintain the action, was rightly refused.

TORT, for breaking and entering the plaintiff's close, and for an assault. Writ dated July 8, 1891.

The declaration alleges that Frank B. Trull, J. Soule, and William A. Robes, at the instigation and request of the defendants, by whom they were employed, forcibly broke and entered the dwelling-house of the plaintiff in Somerville, and violently assaulted the plaintiff by striking him a violent blow on the head with a dangerous weapon, and also assaulted the plaintiff's wife and daughter. Answer, a general denial, and an amended answer alleging, if the defendants, by their agents or servants, "did assault in the manner alleged by the plaintiff, that said assault was justified by the acts of the plaintiff."

At the trial in the Superior Court, before *Hammond, J.*, the jury returned a verdict for the plaintiff; and the defendants alleged exceptions, the material parts of which appear in the opinion.

W. A. Morse, for the defendants.

M. F. Farrell, for the plaintiff.

LATHROP, J. The declaration in this case is for breaking and entering the plaintiff's close; and it alleges further, in the same count, an assault upon the plaintiff by striking him on the head a violent blow with a dangerous weapon, and also assaults upon the plaintiff's wife and daughter. The answer is a general denial, and an amended answer alleges, if the defendants "did assault in the manner alleged by the plaintiff, that said assault was justified by the acts of the plaintiff."

No question of pleading is raised in the case, and we are not called upon to determine whether the alleged assaults upon the plaintiff and his wife and daughter can be considered as distinct charges of injuries, or merely as matters in aggravation of damages. See *Sampson v. Henry*, 13 Pick. 36; *Eames v. Prentice*, 8 Cush. 337.

That the defendant in an action for an assault, if he seeks to justify the assault, must set up such defence in his answer, and that a general denial only is not enough, is well settled. See *Hathaway v. Hatchard*, 160 Mass. 296, 297, and cases cited. To say that the assault was justified by the acts of the plaintiff seems very insufficient. But as no objection was taken to the form of the answer, we do not dwell upon it.

It appears from the bill of exceptions that the plaintiff had hired of the defendants certain articles of furniture, for which he had paid as rent the sum of five dollars, and promised to pay the further sum of one dollar a week until the sums paid should amount to the sum of \$31.29, and such further sums as might be added to this amount by the plaintiff, at which time the rent was to cease, and the articles become the absolute property of the plaintiff. The agreement, which was in writing and signed by the plaintiff, described him as of 79 Broadway, Chelsea, and contained these clauses:

"But in case of failure to pay said rent as aforesaid, the said C. H. Robinson & Co., or their agents, may, without demand or notice, or being deemed guilty of any trespass or tort, and without thereby rendering themselves liable to refund any sums received by them as rent aforesaid, enter any house or place where said articles may be, and take possession of and remove said articles therefrom.

"And I further agree that, so long as said rent shall be pay-

able as aforesaid, I will not injure, sell, mortgage, or relet the said articles, or remove the same from above mentioned place; and that in case of failure to pay the rent, I will, on demand, return said articles to the said C. H. Robinson & Co., or their legal representatives."

It is very clear that a breach of the clause last cited by a removal of the furniture gave the defendants no right to enter upon the land of the plaintiff, or to retake the furniture. The right to enter and remove the furniture is given only by the clause first cited, and this applies only in case of a failure to pay rent.

There is no doubt that the license to enter given by the plaintiff to the defendants was irrevocable. *Heath v. Randall*, 4 Cush. 195. *McNeal v. Emerson*, 15 Gray, 384. *Smith v. Hale*, 158 Mass. 178.

The only question of law raised in the case arises upon the defendants' request to the court to rule, as matter of law, that, upon the evidence, the entry of the defendants was reasonable and proper, and that the plaintiff could not maintain this action. This request was refused. The case was submitted to the jury with full instructions, not excepted to except so far as inconsistent with the above request; but the bill of exceptions does not set forth what instructions were given. Soon after the defendants' servants entered upon the plaintiff's premises, they attempted to remove the furniture, and were resisted by the plaintiff, and it was during this resistance that the assault complained of occurred. The defendants' servants did not succeed in obtaining the furniture, and it is still in the possession of the plaintiff.

It does not clearly appear from the exceptions that any rent was due at the time of the entry. The statement is, "It was agreed that there was still a balance unpaid upon said contract." This may refer to the time of the entry, or to the time of the trial. The exceptions tend also to show that the entry was made because the plaintiff had removed the goods, and because of the failure of the plaintiff to settle the account when demanded. This may, and probably does, mean that, after the removal of the furniture, the defendants demanded a settlement of the entire account. But there is nothing in the contract

which gives the right to the defendants to demand a settlement of the entire account upon a removal, or to enter and remove the furniture, if the plaintiff paid the rent which he agreed to pay.

The case, however, has been argued by both sides upon the supposition that there was a right of entry for failure on the part of the plaintiff to pay rent; and we proceed to consider the case upon this supposition.

We are met at the outset with the question, What is the rule of law applicable to the conduct of a person who has a right to enter upon the land of another? The plaintiff contends that the defendants had no right to use personal violence when resisted; that they could not enforce their rights by a breach of the peace; and that, upon being resisted, they should have desisted and resorted to legal remedies. The defendants, on the other hand, contend that, having a right to enter and remove the furniture, they were entitled to use such force as was necessary; and that they are only liable in case they used excessive force.

The plaintiff's views are in accordance with a dictum of Mr. Justice Wilde in *Sampson v. Henry*, 11 Pick. 379, and with the remarks of Mr. Justice Morton in *Churchill v. Hulbert*, 110 Mass. 42, and with a dictum of Mr. Justice Ames in *Drury v. Hervey*, 126 Mass. 519, which follow and rely upon the dictum in *Sampson v. Henry*. This dictum, however, was held not to be a correct statement of the law, after full consideration, in *Low v. Elwell*, 121 Mass. 309. And that case must be considered as settling the law in this Commonwealth, that a person who has a right to enter upon the land of another and there do an act may use what force is required for the purpose, without being liable to an action. If he commits a breach of the peace, he is liable to the Commonwealth. If he uses excessive force, he is liable to a personal action for an assault. This case has been affirmed in *Coughlin v. Gray*, 131 Mass. 56; in *Stone v. Lahey*, 133 Mass. 426; and in *Twombly v. Monroe*, 136 Mass. 464.

The case of *Commonwealth v. Haley*, 4 Allen, 318, cited by the plaintiff, was, as said by Chief Justice Gray in *Low v. Elwell*, "upon an indictment for forcible entry, and no opinion was required or expressed as to the landlord's liability to a civil action."

The case of *Churchill v. Hulbert*, 110 Mass. 42, was one where clearly excessive force was used, and the remarks of Mr. Justice Morton, in delivering the opinion of the court, "If it be assumed, therefore, that the defendant had an irrevocable license to enter the plaintiff's premises, yet upon being resisted it was his duty to desist from his attempt to enter, and resort to his legal remedies," are based upon the cases of *Sampson v. Henry*, and *Commonwealth v. Haley*, and are inconsistent with the subsequent cases.

In *Drury v. Hervey*, 126 Mass. 519, which was an action of tort for an assault, the plaintiff had no contractual relations with the defendant. The tenant of two rooms in the house which the plaintiff occupied undertook to give the defendant a right to enter and take a chattel in case the tenant did not pay for it as agreed. The remarks of Mr. Justice Ames, in the beginning of the opinion, based upon *Sampson v. Henry* and *Churchill v. Hulbert*, that, as a general rule, a right to enter is not to be enforced at the expense of a breach of the peace, cannot, since the decision of *Low v. Elwell*, be considered as having any bearing, where the right to enter is given by a person having entire control of the premises. Nor do we think that the court intended in any way to discredit the rule laid down in *Low v. Elwell*, for the reasoning of the court in favor of the plaintiff on this branch of the case proceeds upon the ground that the plaintiff, in resisting the efforts of the defendant's servants to enter the house, had no reason to know or believe, other than their unsupported word, that the strangers who were seeking admission had any right whatever to go to the tenant's room to take away furniture in his absence; that it was reasonable for her to ask them to wait until he returned; and that under such circumstances she had a right to resist their entrance.

We are of opinion, therefore, that the contention of the defendants presents a correct view of the law.

The remaining question is whether there was evidence of the use of excessive force on the part of the defendants' servants proper to be submitted to the jury. We are of opinion that there was.

There was evidence that, when one of the defendants' ser-

vants knocked at the outside door, and it was opened by the plaintiff's daughter, these servants rushed into the house in a violent and rude manner, throwing the girl back on the stairs, and frightening her; that afterwards one of these servants went around to the rear of the house and opened a window, jumped into the house, and pushed the plaintiff's wife violently against the side of the house; that when the plaintiff arrived he found these servants sitting down in the parlor; that he asked them why they were there and what they wanted, and opened the doors, and requested them to go out, and they made no reply; that he then went to the kitchen and got a rolling-pin, and returned into the room where the men were; and that thereupon one of them seized him by the arm, and another of them wrested the rolling-pin from him, "and committed the assault as complained of."

It is impossible, on this evidence, to say that there was no evidence of excessive force. The ruling requested by the defendants was therefore rightly refused; and the entry must be

Exceptions overruled.

FRANCIS T. BAKER & others vs. WILLIAM THOMPSON
& others.

Suffolk. March 7, 1894. — June 23, 1894.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Real Action — Life Estate — Fee Simple.

A bequest to the wife of a testator of "all the residue and remainder of my property and estate, real and personal, of which I may die seised or possessed, or to which at the time of my decease I may be in any way entitled," standing alone, would give the wife an absolute fee; but when immediately followed by the qualifying words "for her support, and for the support and education of our only child," and with a further provision that what shall remain at the death of the wife shall go to the son, "his heirs, executors, administrators, or assigns forever," and a clause at the conclusion of the residuary bequest giving the wife power "to sell and dispose of any real or personal estate, . . . either at public or private sale, as she may deem best," it shows that it was not the intention of the testator to give his wife the fee.

WRIT OF ENTRY, dated December 1, 1892, to recover possession of a tract of land in Boston. Plea, *nul disseisin*.

The demandants are the heirs of Joseph H. Eayrs, who died on March 6, 1865, seised of the demanded premises, and leaving a will, dated December 21, 1857, which was duly admitted to probate, and contained the following residuary clause :

"All the residue and remainder of my property and estate, real and personal, of which I may die seised or possessed, or to which at the time of my decease I may be in any way entitled, I give, devise, or bequeath to my wife, Emily P. Eayrs, for her support, and for the support and education of our only child, Joseph Hearsey Eayrs, 2d. At her decease, all that shall then remain of my said property I give, devise, and bequeath to my said son Joseph, to be held in trust till he shall arrive at the age of twenty-one years, to him, his heirs, executors, administrators, or assigns forever. My said wife, Emily P. Eayrs, is hereby authorized to sell and dispose of any real or personal estate which I may leave, either at public or private sale, as she may deem best."

The son, Joseph Hearsey Eayrs, 2d, died on April 4, 1860, aged four years, and the widow, Emily P. Eayrs, died on March 19, 1892, not having disposed of the demanded premises.

At the trial in the Superior Court, without a jury, before *Hammond, J.*, the demandants contended that under the will the widow, Emily P. Eayrs, took a life estate only, and the tenants, who were her devisees, contended that she took an estate in fee.

The judge ruled that the widow did not take a fee, and found for the demandants, and, at the request of the tenants, reported the case for the determination of this court. If the ruling was wrong, the finding was to be set aside ; otherwise, judgment was to be entered thereon.

N. U. Walker, for the tenants.

W. Howland, (*C. H. Innes* with him,) for the demandants.

MORTON, J. It is true, as the demandants contend, that the words "all the residue and remainder of my property and estate, real and personal, of which I may die seised or possessed, or to which at the time of my decease I may be in any way entitled, I give, devise, or bequeath to my wife, Emily P. Eayrs," if they stood alone, would give the wife an absolute fee. But they are

qualified, in the first place, by the words which directly follow them, "for her support and for the support and education of our only child, Joseph Hearsey Eayrs, 2d." In the next place, the will goes on to provide that what shall remain at the death of the wife shall go to the son Joseph, "his heirs, executors, administrators, or assigns forever," showing plainly that it was not the intention of the testator to give her a fee. And, lastly, in the concluding sentence of the residuary clause the testator gives his wife power "to sell and dispose of any real or personal estate, . . . either at public or private sale, as she may deem best," which would be unnecessary if he intended to give her a fee, and is inconsistent with an estate of fee simple. We think the ruling was right. See *Chase v. Ladd*, 153 Mass. 126; *Kent v. Morrison*, 153 Mass. 137, 139. *Judgment on the finding.*

CLARA E. B. BILLOWS vs. JOSEPH B. MOORS.

Suffolk. March 8, 1894. — June 23, 1894.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Personal Injuries from Defective Elevator — Licensee — Volunteer.

The wife of the janitor of an apartment house or hotel, for the purpose of showing a new tenant where to hang clothes, went, at the request of her husband, to the roof of the hotel by the stairway. In returning she used a freight elevator, which she entered by stepping over a rail or bar placed across the entrance to the elevator about eighteen inches from the floor and locked. She chose that method of descent for her own convenience. She was not shown to have any knowledge of a rule forbidding the riding on the elevator, and she had seen others riding on it without objection from the superintendent of the building. Held, in an action against the owner of the hotel for damages for injuries sustained by reason of the alleged defective condition of the elevator, that the plaintiff was a volunteer, using the elevator without authority or license from the defendant, for the purpose of assisting her husband, and that the defendant owed no duty to her to see that the elevator was in a safe condition, but only the duty to abstain from wilful injury to her.

TORT, for personal injuries sustained by the plaintiff by reason of the alleged unsafe condition of an elevator in a building owned by the defendant. Writ dated March 17, 1892.

At the trial in the Superior Court, before *Aldrich, J.*, there was evidence tending to show that the plaintiff was the wife of Charles M. Billows, and that on December 9, 1891, the date of the accident, she was living with her husband at the Hotel Edinburgh, an apartment house on Columbus Avenue in Boston, owned by the defendant, where her husband was employed as janitor. On that day, at the request of her husband, she went with one Mrs. Nichols, who had then recently moved into one of the apartments, to the roof of the hotel to show her where to hang clothes. In going up to the roof she used the stairs, but in coming down she used a freight elevator, or lift, which she entered at the top landing by stepping over a railing or bar placed across the entrance to the elevator, about eighteen inches from the floor, and locked. As she stepped upon the elevator, which was defective and out of repair, it fell to the bottom of the well, and she received the injuries in question.

The plaintiff testified that prior to the accident she had no knowledge of a rule forbidding persons to ride on the elevator, but she knew that by the orders of one Curtis, the superintendent in charge of the building, the elevator was not to be used by the inmates of the house, unless it was, after using, returned to the bottom of the well, and that before the accident she had seen persons riding on it in the presence of Curtis without objection from him. There was also evidence tending to show that it was easier to lower the elevator to the bottom of the well with some one on it than to haul it down by hand, and that the process of hauling it down by hand took from five to ten minutes.

This was all the evidence material to the plaintiff's case, at the conclusion of which the judge ruled that the action could not be maintained, and directed a verdict for the defendant, and reported the case for the determination of this court.

J. J. Feely, for the plaintiff.

R. M. Morse, (*C. E. Hellier* with him,) for the defendant.

MORTON, J. The hiring of the plaintiff's husband by the defendant did not include her, and there is nothing to show that the relation of master and servant existed between the plaintiff and defendant at the time of the injury complained of. When hurt the plaintiff was returning to the basement in the elevator,

after having been up to the roof at her husband's request with Mrs. Nichols to show her where to hang clothes. In going up she used the stairs, and could have done so in coming down. She used the elevator, it may fairly be assumed, for her own convenience; it being easier to lower it to the bottom of the well with some one on it than to haul it down by hand. The question is, what duty, if any, the defendant owed her in regard to the condition of the elevator. The answer depends on what the relation was in which she stood to him. It is plain that she was discharging no duty which she owed to him. Neither was she using the elevator by his invitation, express or implied. It is true that there was testimony tending to show that she had no knowledge of the rule forbidding persons to ride on the elevator, and that she had seen others do it without objection from Curtis. But these facts did not create of themselves any duty or liability on the part of the defendant towards her. If she had been in his employ, they might have furnished justification for what she did, if the locked bar could not be regarded as a notice to every one except those authorized to use it that in using the elevator they did so at their peril.

In going up to the roof with Mrs. Nichols, the plaintiff acted at her husband's request, and for the purpose of assisting him. In returning the elevator to the basement, she may also have been influenced in part by a desire to assist him. There was no necessity that she should ride down in the elevator, though doubtless it was more convenient to do so. But her husband's request, and the service which she rendered in consequence of it, could not, without the knowledge and assent of the defendant, create any liability on his part towards her. The husband had no authority to bind the defendant, and no obligation arose on the defendant's part towards her out of the gratuitous, incidental, unauthorized, and unratified service which he received from her through the assistance which she rendered to her husband. We doubt if the plaintiff could be regarded as a licensee. For that would give an express or implied permission, in spite of the apparent prohibition manifested by the locked bar. We think that she is to be regarded rather as a volunteer, using the elevator without any authority or license whatever from the defendant for the purpose of assisting her husband, and that the

defendant owed no duty to her to see that the elevator was in a safe condition, but only the duty to abstain from wilful injury to her.

Exceptions overruled.

HENRY KELLOGG, JR. vs. HOSEA W. LEACH & others.

Suffolk. March 9, 1894. — June 23, 1894.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Recognizance — Affidavit for Arrest of one of two Judgment Debtors.

A statement in an affidavit made upon an application for the arrest of two judgment debtors, "that the debtors A. and B., named in the said execution, have property not exempt from being taken on execution which he does not intend to apply to the payment of the judgment," is to be construed distributively, as if it read, "the debtors A. and B. . . . each have property . . . which he does not intend to apply to the payment of the judgment."

CONTRACT, upon a poor debtor's recognizance, entered into on March 2, 1893, by the defendant Leach as principal, and the other defendants as sureties.

At the trial in the Superior Court, before *Dewey, J.*, it appeared that the plaintiff had recovered a judgment in the Superior Court against the defendant Leach and one Porter A. Underwood, upon which, on January 3, 1893, execution duly issued, and an application was made to a court having jurisdiction of the parties for a certificate authorizing the arrest of both Leach and Underwood, in which the affiant stated that he believed "that the debtors Hosea W. Leach and P. A. Underwood, named in the said execution, have property not exempt from being taken on execution which he does not intend to apply to the payment of the judgment creditor's claim."

The judge ruled that the allegation "have property not exempt," etc., considered in connection with the other parts of the affidavit, was to be construed distributively, and admitted the affidavit; and the defendants excepted.

The plaintiff offered in evidence the citation issued upon the application above stated, directed to both Leach and Underwood, as judgment debtors, to appear before the district court upon a

day and hour named and submit to an examination touching their estate. The defendants contended that the citation was invalid by reason of the joinder therein of both the judgment debtors, but the judge ruled that it was sufficient, and admitted it; and the defendants excepted.

The defendant Leach was arrested on the execution, and recognized on the usual conditions that he should within thirty days "deliver himself up for examination, before some magistrate authorized to act, giving notice of the time and place thereof," as by law provided, and afterward made default. The defendants asked the judge to rule that the recognizance was void, because the condition required the debtor to deliver himself up before some magistrate, instead of before some court of record, or police, district, or municipal court, or, except in the county of Suffolk, some trial justice. The judge declined so to rule; and the defendants excepted.

The judge directed the jury to return a verdict for the plaintiff for the amount of the recognizance; and the defendants alleged exceptions.

W. C. Cogswell, for the defendants, did not care to be heard.

C. F. Eldredge, for the plaintiff.

MORTON, J. The first objection which the defendants make is, that the affidavit annexed to the execution is defective in stating "that the debtors Hosea W. Leach and P. A. Underwood, named in the said execution, have property not exempt from being taken on execution which he does not intend to apply to the payment of the judgment creditor's claim." It is contended that it is uncertain who is meant by "he," and that therefore there is no charge that the defendant Leach has property which he does not intend to apply to the payment of the plaintiff's claim. But we think that the affidavit is to be construed distributively, as if it read, "the debtors Hosea W. Leach and P. A. Underwood each have property," etc. *Abbott v. Tucker*, 4 Allen, 72. *Hill v. Bartlett*, 124 Mass. 399. *Foster v. Leach*, 160 Mass. 418. *Stearns v. Hemenway*, ante, 17.

The other questions are disposed of by *Stearns v. Hemenway*, *ubi supra*, and therefore need not be further considered.

Exceptions overruled.

WILLIAM BASSETT vs. GEORGE E. ROGERS & another.

Suffolk. March 19, 1894. — June 23, 1894.

Present: HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Sale of Land — Principal and Agent — Liability of Broker to account for entire Proceeds of Sale — Evidence.

By separate written agreements, both executed on the same day, A. and B. each bound himself to convey his land to the order of C. for a consideration named, and to pay him a brokerage commission for effecting a sale of it. Subsequently A., by the direction of C., conveyed his land to B., and gave to C. an order to receive the consideration. C. collected from B. a larger sum than the consideration named, receipted for it, and, after paying over to A. the price named by him, retained for himself the excess which he had received from B. A. afterward paid C. his brokerage commission. *Held*, in an action by A. against C. to recover the excess so retained by him, that, if C. was acting as the agent or broker of A., good faith required that he should account to him for all that he received from the sale of his property, and that there was evidence proper to be considered on which it would have been competent for the jury to find that the transaction was in substance one where A. and B. were engaged as principals and C. was acting as their agent or broker, and whether C. was so acting was a question of fact which should have been submitted to the jury.

Evidence of the circumstances under which a written agreement for a sale of land was entered into, and the acts and declarations of the parties under it, are admissible for the purpose of assisting in interpreting and applying the agreement, but not for the purpose of contradicting or varying its terms.

The plaintiff agreed in writing to convey land to the order of the defendant for a price named, and to pay him a brokerage commission for effecting a sale of it. The defendant sold the land for a sum larger than the price named by the plaintiff, and retained the difference himself, and charged the plaintiff his commission. *Held*, in an action to recover the difference, that the plaintiff should have been permitted to show that his property had been and was in the hands of the defendant for sale as a broker on commission before and at the time of signing the agreement, as well as what representations were made by the defendant as to his object in taking the agreement, and its purposes so far as he was concerned, as, if they were of the nature which the plaintiff offered to show, they had a tendency to show that the agreement was procured by fraud and misrepresentation on the part of the defendant.

TORT, to recover the value of twenty-five shares of the stock of the Union Pacific Railway Company, and the value of a promissory note of one C. C. Homer for \$269.90, alleged to have been wrongfully withheld from the plaintiff, and converted by the defendants to their own use. Writ dated June 15, 1891.

At the trial in the Superior Court, before *Braley, J.*, there

was evidence tending to show that on August 28, 1888, the plaintiff agreed in writing to sell and convey "to the order of George E. Rogers and P. Briggs Wadsworth" a parcel of land with the buildings thereon situated on Dalton Street in Boston, receiving in payment therefor the real estate and personal property named and described in a memorandum annexed to the agreement, and "to pay to George E. Rogers and P. Briggs Wadsworth a brokerage commission of three hundred and fifty dollars."

The several parcels of real estate and articles of personal property named in the memorandum annexed to the agreement, with their respective values, were: 18,400 feet of land, Summer Street, Chelsea, \$2,300; 14,080 feet of land, Melrose, \$2,112; 5,000 feet of land, Orange Street, Chelsea, \$2,000; lease on Chestnut Street, Boston, guaranteed to net \$925; 2 shares Leavenworth and Topeka Railroad stock \$200; amounting in all to \$7,537.

On the same day one Blanchard also agreed in writing to sell and convey "to the order of" the defendants certain parcels of real estate and certain articles of personal property, agreeing to receive in payment therefor the house of William Bassett, the plaintiff, on Dalton Street in Boston, and to pay to the defendants "the usual brokerage commission of two and one half per cent on value of land as per above schedule."

The schedule referred to was as follows: 18,400 feet land, Summer Street, Chelsea, \$1,840; 5,000 feet land, Orange Street, Chelsea, \$2,000; 25 shares Union Pacific 61 $\frac{50}{100}$, \$1,537.50; 14,080 shares [*sic*], Melrose, \$1,408; lease, Chestnut Street, Boston (guaranteed), \$925; note due September 29 (guaranteed), \$269.90; amounting in all to \$7,980.40.

Subsequently, on September 12, 1888, the plaintiff, by the direction of the defendants, conveyed his land on Dalton Street, Boston, to the wife of Blanchard, and received from Blanchard through the defendants a conveyance of his land in Chelsea and Melrose, an assignment of the lease of the property on Chestnut Street, Boston, and two shares of Leavenworth and Topeka Railroad stock; but he did not receive the two shares of Union Pacific Railway stock, nor the promissory note of Homer, which were a part of the consideration to be paid by Blanchard for the purchase of the plaintiff's property, although they were transferred by Blanchard to the defendants. It was admitted by the defend-

ants, at the trial, that the note was paid at maturity, and that the value of the Union Pacific Railway stock was \$61.25 per share. On October 27, 1888, the defendants presented to the plaintiff a bill for their commission of \$350 for selling his real estate, and it was paid by him. On September 10, 1888, the defendants procured from the plaintiff an order on Blanchard to deliver the personal property to one of them, upon which, on receiving it, the defendants wrote: "Received of Alfred Blanchard, in compliance of this order, 25 shares of stock of Union Pacific Railroad, at \$61.50 per share, \$1,537.50; lease of estate, 43 Chestnut Street, Boston, \$925.00; note of C. C. Homer, Malden, Mass., due Sept. 29 - Oct. 2, 1888, \$266.90. Same being in full to cover the personal property described in an agreement of Alfred Blanchard to purchase of Wm. Bassett estate of Dalton Street, Boston. Geo. E. Rogers, and for P. Briggs Wadsworth."

In support of his contention that in this transaction the defendants were acting as brokers for him on commission, the plaintiff offered evidence of conversations between him and the defendants at a time prior to the making of his agreement, when the defendants had his real estate for sale in the ordinary way as brokers, as to the purpose for which they wanted such a paper. He also offered to show that, when the defendants obtained the agreement from him, his property was in their hands for sale as brokers upon commission; that they told him that they always took a paper agreeing that the title should go to their order, so as to protect them in their business; that they frequently had trouble when only a verbal order to sell was left with them, and that the property was to be left with them as agents to sell; and that thereupon he signed the agreement. He further offered the conversation of the parties at the time of the execution of the agreement as to the purpose or use for which the defendants desired it. The judge excluded the evidence; and the plaintiff excepted.

The plaintiff further offered conversations between the parties subsequent to the execution of the agreement, but the judge excluded them, and ruled that only a subsequent contract between the parties could be shown; and the plaintiff excepted.

At the close of the plaintiff's case, the judge, at the request of the defendants, ruled that the action could not be maintained,

and directed the jury to return a verdict for the defendants; and the plaintiff alleged exceptions.

W. H. Drury, for the plaintiff.

R. M. Morse, for the defendants.

MORTON, J. We think that the case should have been submitted to the jury, and that the evidence which was offered by the plaintiff should have been admitted. The plaintiff contended that in making the sale the defendants were acting as his agents and brokers. There was evidence which the jury might properly have considered as bearing on that question, and it was a question of fact for the jury whether they were so acting. The plaintiff agreed to pay, and did pay, the defendants a commission for effecting the sale, which had some tendency to show that they were acting as his brokers. The agreement which he signed, and on which the defendants rely, bound him to convey, not to the defendants, but to their order, which tended to show that they were acting as intermediaries between the plaintiff and a purchaser. The order which the defendants procured from the plaintiff on Blanchard for the delivery of the personal property, and the receipt which they gave, also had some tendency to show that they were acting as agents for the plaintiff. It would have been competent for the jury to find that the transaction was in substance one where the plaintiff and Blanchard were engaged as principals, and the defendants were acting as their agents or brokers. There was nothing in the agreement inconsistent with this view. As already observed, it was not an agreement to sell to the defendants, but to their order. The defendants did not agree by it to purchase. It was consistent with the terms of the agreement, that it was taken by the defendants for their protection in negotiating a sale for the plaintiff. If they had made a sale for the consideration, and on the terms named in it, the plaintiff would have been bound by the sale. It did not purport to give them the right, if they succeeded in getting more than the consideration named, to pocket the difference between that and what was actually obtained. On the contrary, the only compensation referred to in it was a "brokerage commission of three hundred and fifty dollars" which the plaintiff was to pay them. If the defendants were acting as the agents or brokers of the plaintiff, good faith required that they should account to him for

all that they received from the sale of his property; and we think that there was nothing in the nature of the agreement to prevent the court from submitting to the jury the question whether that relation existed between them, and that it ought to have done so.

We also think that the evidence which the plaintiff offered should have been admitted. For the purpose of assisting in interpreting and applying the agreement, it was competent for the plaintiff to show the circumstances under which the agreement was entered into, and the acts and declarations of the parties under it. *Knight v. New England Worsted Co.* 2 Cush. 271. *Adams v. Morgan*, 150 Mass. 143. *Whittier Machine Co. v. Graffam*, 156 Mass. 415.

Such evidence is not admitted for the purpose of varying or contradicting the written agreement, but to aid in getting at its true construction. The plaintiff also should have been permitted to show that the property had been and was in the hands of the defendants for sale, as brokers on commission, before and at the time of the agreement. Evidence of the representation of the defendants as to their object in taking the agreement, and its purposes so far as they were concerned, should likewise have been admitted. If of the nature which the plaintiff offered to show, they had a tendency to show that the agreement was procured by fraud and misrepresentation on their part.

Exceptions sustained.

SARAH S. FULLER vs. INHABITANTS OF HYDE PARK.

Norfolk. March 21, 1894. — June 23, 1894.

Present: HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Way — Due Care of Plaintiff — Notice — Evidence.

A notice to a town stated that a person was injured by falling "over the root of a tree on the sidewalk of Central Park Avenue." The accident in fact occurred on Hyde Park Avenue at a point near the junction of those ways. Held, that, in the absence of an intention to mislead, the notice, though meagre as to the

statement of the place of the injury, was not so defective as to render it invalid.

In an action against a town for injuries occasioned by a defect in the highway, the testimony of an inhabitant and taxpayer of the town, who at the time of the accident was walking with the plaintiff, that within thirty days after the accident he had conversations with the chairman of the selectmen, the superintendent of streets, and the chief of police respecting the time, place, and cause of the injury, is competent for the purpose of showing that the defendant was not misled by a notice given by the plaintiff erroneously stating that the injury was caused by his falling "over the root of a tree on the sidewalk of Central Park Avenue," when in fact the accident occurred on Hyde Park Avenue near the junction of the two ways, and, if believed by the jury, would justify them in finding that the defendant was not misled by the inaccuracy of the notice.

At the trial of an action against a town for injuries occasioned by a defect in a highway, the plaintiff testified that he was "walking along quietly" or "comfortably" on the sidewalk with two other persons, when he tripped and fell; that there was an electric light "there somewhere," but that the reason for his not seeing the object over which he fell was that he "was talking with either Mr. or Mrs. N., and my face was turned away for one thing. I might not have looked at it. Another thing, I never supposed for a moment there was anything out of the way there." On cross-examination he testified, "Had I supposed it was a dangerous place I could have seen perfectly well by looking, but supposing it was all right I did not look." He also testified that he had previously avoided the sidewalk, and had walked in the street because of the loose stones and *débris* on the sidewalk, and the fear he had of falling; but that a short time before he fell his attention had been called to the sidewalk as being in a proper condition to be walked over. *Held*, that, upon this evidence, the question of the due care of the plaintiff was properly submitted to the jury.

TORT, for personal injuries occasioned to the plaintiff by a defect in the highway of the defendant town. Answer: 1. A general denial. 2. That no notice was given by the plaintiff of the time, place, and cause of the injury, as required by law. Trial in the Superior Court, before *Blodgett, J.*, who allowed a bill of exceptions, in substance as follows.

It appeared that in the evening of June 6, 1891, the plaintiff, while walking on the highway, fell over the root of a tree in the westerly sidewalk of Hyde Park Avenue, at a point not far from an electric light nearly opposite Dell Avenue, and not far from the junction of Central Park Avenue and Hyde Park Avenue. The notice given by the plaintiff, dated June 12, 1891, and addressed to the selectmen of Hyde Park, stated that she "fell over the root of a tree on the sidewalk of Central Park Avenue." It was conceded at the trial that the plaintiff, in erroneously stating the place of the accident, had no intention to mislead the defendant town. For the purpose of showing that the town was

not in fact misled thereby, the plaintiff called as a witness John B. Neale, an inhabitant and taxpayer of the town, who testified that he and his wife were in company with the plaintiff at the time when she fell; that within thirty days after the plaintiff's injury he called on the chairman of the defendant's board of selectmen, showed him the root which he had pulled out of the sidewalk at the place where the plaintiff fell, and told him exactly the location of it; that within the same period he told the chief of police of the defendant town where and how the accident happened, and he also went with the superintendent of streets to the place of the accident, and called his attention to the remaining roots, some of which the superintendent then took out, and said he would have the others taken out. This evidence was admitted, subject to the defendant's objection and exception.

The plaintiff testified that she was "walking along quietly," and in another place that she was "walking along comfortably," with Mr. and Mrs. Neale, when she tripped over something and fell; that there was an electric light there somewhere, but she could not locate it, and when asked why she did not see the thing that she fell over if there was an electric light there, she replied, "I was talking with either Mr. or Mrs. Neale, and my face was turned away for one thing. I might not have looked at it. Another thing, I never supposed for a moment there was anything out of the way there." On cross-examination, she testified, "Had I supposed it was a dangerous place I could have seen perfectly well by looking, but supposing it was all right I did not look." She also testified that she had previously avoided the sidewalk, and had walked in the street because of the loose stones and *débris* on the sidewalk, and the fear she had of falling; but that a short time before she fell her attention had been called to the sidewalk as being in a proper condition to be walked over.

There was evidence from which the jury might find that the way was defective at the point where the accident occurred, and that the defect had existed for such a length of time that the jury might infer that the defendant had notice thereof, and that by the exercise of reasonable care on its part the defect might have been remedied.

At the conclusion of the plaintiff's case the defendant requested the judge to rule:

1. That upon all the evidence the action could not be maintained. 2. That there was no sufficient notice of the time, place, and cause of the injury given to the defendant town. 3. There was no evidence that the witness Neale had any authority or direction from the plaintiff to notify the defendant town or its officers of the time, place, and cause of the plaintiff's injuries. 4. A mere casual conversation by the witness Neale with any of the town officers in regard to the place of the injury was to be disregarded.

The judge instructed the jury that the written notice was not sufficient to entitle the plaintiff to maintain this action, unless she proved that the defendant was not in fact misled by the inaccuracy in stating the place where she was injured, and declined to give any of the other instructions as requested, but instructed the jury that, if they believed the testimony of Neale, they would be authorized to find that the defendant was not in fact misled by the inaccuracy in the written notice.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

J. E. Cotter, for the defendant.

C. C. Read, for the plaintiff, was not called upon.

MORTON, J. No question is made as to the sufficiency of the notice in respect of the time and cause of the injury. It is contended that it is insufficient as to the place. The notice is meagre in that particular, but we do not think that it is so defective as to render it invalid. The place is described as on Central Park Avenue, and is further identified by the cause of the injury, which is stated as "the root of a tree on the sidewalk." It was said in *Gardner v. Weymouth*, 155 Mass. 595, 597, that a notice may be inaccurate through insufficiency as well as actual mistake, and that the injured party may recover if there was no intention to mislead and the inaccuracy did not in fact mislead. It is conceded that there was no intention to mislead, and we cannot say that a description of the place of the accident as on the sidewalk of a certain street where there was the root of a tree might not, if correct, be of material assistance to the authorities in investigating the claim, and determining where

the accident occurred. *Fortin v. Easthampton*, 142 Mass. 486. *Gardner v. Weymouth*, 155 Mass. 595, 597. *Norwood v. Somerville*, 159 Mass. 105.

The mistake in regard to the name of the street is not surprising, when the nearness of the place of the accident to the junction of the two ways and the general direction of Central Park Avenue are considered.

The testimony of Neale was rightly admitted for the purpose of showing that the defendant was not in fact misled by the notice. *Norwood v. Somerville*, *ubi supra*.

The circumstances under which his conversations with the chairman of the selectmen, the superintendent of streets, and the chief of police took place were such as to prevent them from being mere casual conversations, which those officers might or might not have regarded; and the jury were rightly instructed that, if they believed Neale's testimony, they would be justified in finding that the defendant was not misled by the inaccuracy of the notice.

The defendant further contends that the plaintiff was not in the exercise of due care. The plaintiff testified that she was "walking along quietly," or, as she said in another place, "walking along comfortably," on the sidewalk with Mr. and Mrs. Neale, when she tripped over something and fell. She testified that there was an electric light "there somewhere," and, when asked why she did not see the thing that she fell over if there was an electric light there, replied, "I was talking with either Mr. or Mrs. Neale, and my face was turned away for one thing. I might not have looked at it. Another thing, I never supposed for a moment there was anything out of the way there." On cross-examination she said, "Had I supposed it was a dangerous place I could have seen perfectly well by looking, but supposing it was all right I did not look." She also testified that she had previously avoided the sidewalk, and had walked in the street because of the loose stones and *débris* on the sidewalk and the fear she had of falling; but that a short time before she fell her attention had been called to the sidewalk as being in a proper condition to be walked over. Upon this evidence the question of the plaintiff's due care was one pre-eminently for the jury. The plaintiff was not bound to exercise

the highest degree of care possible, but only such care as an ordinarily prudent person would have used under like circumstances. Her knowledge of the previous dangerous condition of the sidewalk was consistent, as has been frequently held, with due care on her part at the time when she was injured, especially when taken in connection with her testimony that a short time before the fall her attention had been called to the sidewalk as being in a proper condition to be walked over.

We discover no error in the rulings or instructions, or refusal to rule as requested. *Exceptions overruled.*

JOHN B. BROWN, executor, *vs.* CYNTHIA M. BARON,
appellant.

Middlesex. March 23, 1894. — June 23, 1894.

Present: HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Exoneration of Specific Devise from Mortgage — Effect of Residuary Devise to Executor with Power to Sell — Rents of Realty devised to Executor — Account — Estoppel — Mistake.

Real estate specifically devised is, in the absence of a contrary intention on the part of the testator, exonerated from a mortgage placed upon it by him, though the personal estate may be insufficient for the payment of general legacies.

A residuary devise to the executor, with power to sell the real or personal estate, does not first vest in him the mere power to sell to create a fund for the payment of debts and legacies, with the right to have what may remain, but vests in him at once the title to the residue, with authority to sell any or all of the estate, and apply it to the payment of debts and legacies, and until a sale the rents and profits belong to him as residuary devisee.

An executor who, in his first account, erroneously charges himself with the rents of real estate to which he was himself entitled as residuary devisee, is not estopped from showing the mistake, and having it corrected.

APPEAL, by Cynthia M. Baron, a legatee under the will of Mary Merriam Abbott, from a decree of the Probate Court, dated May 23, 1893, allowing the first account of the executor. The case was heard by *Knowlton, J.*, upon the decree of the Probate Court, the objections thereto, and an agreed statement of facts, in substance as follows.

Mary Merriam Abbott died on February 5, 1892, leaving a will, dated December 26, 1885, which was duly admitted to probate, and which, after various small bequests, by clause fourteen gave a legacy of \$8,000 to Maria M. Brown, a sister of the testatrix, and by clause fifteen a similar legacy to another sister, Cynthia M. Baron, the appellant. By clause eighteen she gave to her nephew, John B. Brown, who was the executor of the will, "the land and the buildings thereon situated on the corner of Moody and Austin Streets in the city of Lowell." By clause twenty-five she gave to her executor "full and free power to sell any or all of my real or personal estate, whenever, in his judgment, it may be deemed by him advisable to do so, without any more power than is contained in this will; and in the event of the amount realized from the sale of the said estate being insufficient to pay the legacies hereinbefore mentioned, then the amounts, eight thousand dollars each, in the fourteenth and fifteenth paragraphs, left respectively to my sisters, Maria M. Brown and Cynthia M. Baron, shall be equally reduced to make good the amounts left in the other legacies. But in the event of the amount realized from the sale of my said real and personal estate being more than sufficient to pay the legacies hereinbefore mentioned, then I give, devise, and bequeath the excess from such sale, and all the rest and residue of my estate, real, personal, or mixed, of which I shall die seised and possessed, to my nephew, John B. Brown, to have and to hold the same to him, his executors, administrators, and assigns forever."

At the time of the death of the testatrix the property on Moody Street was subject to a mortgage, which had been given by the testatrix and a sister who had died before her, leaving the testatrix as her residuary devisee, to the Mechanics' Savings Bank of Lowell, to secure a note given to it for the sum of three thousand dollars borrowed by them.

The executor paid the sum of one hundred and fifty dollars as interest on the mortgage note, and also the further sum of four hundred dollars on account of the principal of the note, and charged these sums in his account. He also collected \$69.17 as rent on the estate of the testatrix on Bridge Street, which by mistake he credited in his first account as belonging to the estate. This item was subsequently stricken from the account

by the auditor to whom it was referred for revision, on the ground that the Bridge Street property belonged to the executor as residuary legatee or devisee, until sold for the payment of the debts and legacies, and that meanwhile he was entitled to the rents thereof.

The estate of the testatrix was insufficient for the payment in full of the two legacies of eight thousand dollars each to her sisters, and if the mortgage indebtedness were paid therefrom the surplus available to pay those legacies would be still smaller.

The appellant objected to the decree because of the allowance in the executor's account of the sums paid by him on account of the principal and interest of the mortgage, and because of the allowance to the executor as residuary legatee of the rents of the Bridge Street property. The judge was of opinion that the decree ought to be affirmed, but, at the request of the appellant, reported the case for the consideration of the full court.

H. P. Fellows, for the appellant.

J. F. Haskell, for the appellee.

MORTON, J. The appellant objects to the payments made by the executor on account of the mortgage on the Moody Street property, and also insists that the rents of the Bridge Street estate do not belong to the executor as residuary legatee, but belong to the heirs at law, or to the estate.

By the eighteenth clause of the will of Mary Merriam Abbott, the Moody Street property was specifically devised to John B. Brown, the executor. At the time of the death of the testatrix it was subject to a mortgage which had been given by the testatrix and her sister to the Mechanics' Savings Bank of Lowell to secure a note given to it for money borrowed by them. There is nothing in the will indicating an intention on the part of the testatrix that the devisee should pay the mortgage, or that any different course should be pursued in the payment of that debt from that pursued in the payment of her other debts. There is a provision that certain legacies shall abate in case of a deficiency, which would imply that the devise and legacy to the executor are not to be diminished. And we see nothing to take the case out of the well settled rule in this Commonwealth, that the devisee of specific real estate is entitled, in the absence of a contrary intention on the part of the testator, to have it exon-

erated from a mortgage placed upon it by the testator, even though the personal estate is insufficient to pay general legacies. *Hewes v. Dehon*, 3 Gray, 205. *Plimpton v. Fuller*, 11 Allen, 139. *Towle v. Swasey*, 106 Mass. 100. *Farnum v. Bascom*, 122 Mass. 282. *Richardson v. Hall*, 124 Mass. 228. *Morse v. Bassett*, 132 Mass. 502. *Creesy v. Willis*, 159 Mass. 249.

By the twenty-fifth clause of the will the executor is made residuary legatee, and is given power as executor to sell any of the real or personal estate. The Bridge Street estate formed part of the rest and residue, and the title therefore vested in the executor, subject to be divested by a sale, and until a sale the rents and profits belonged to the executor as residuary legatee. *Gibson v. Farley*, 16 Mass. 280. *Newcomb v. Stebbins*, 9 Met. 540. *Almy v. Crapo*, 100 Mass. 218. *Brooks v. Jackson*, 125 Mass. 307, 310.

The effect of the residuary clause was not to vest in the executor first the power to sell to create a fund for the payment of debts and legacies, and then to give him what might remain; but it was to vest in him individually the title to the residue, with authority as executor to sell any or all of the estate, and apply it to the payment of debts and legacies. *Brooks v. Jackson*, 125 Mass. 307, 310.

Upon discovering that he had mistakenly charged himself in his first account with the rents of the Bridge Street estate, he was entitled to have the error corrected. He will be presumed to have been in possession as devisee, and not as executor, and there is nothing in the fact that he included the rents in his account as executor to estop him from showing that it was a mistake. *Newcomb v. Stebbins*, *ubi supra*.

Decree affirmed.

EARL C. ANTHONY & others vs. NEW YORK, PROVIDENCE,
AND BOSTON RAILROAD COMPANY.

Worcester. October 5, 1893. — June 28, 1894.

Present: FIELD, C. J., HOLMES, KNOWLTON, LATHROP, & BARKER, JJ.

Recording Lease during Arguments at Trial — Statute — Right of Lessee or Reversioner to bring Action — Damages for Destruction of Buildings by Fire from Locomotive Engines — Provisions of Written Lease as affecting Third Party — Evidence — Expert.

At the trial of an action for damages caused by the destruction of buildings by fire communicated by the locomotive engines of the defendant railroad, it appeared that the plaintiff was lessee under a lease for ten years, which when admitted in evidence had not been recorded, but was recorded during the arguments. At the time of the fire there remained of the term nearly eighteen months, and the defendant contended that the lease was not evidence of any title in the plaintiff as against the defendant, because, being unrecorded, it was void under Pub. Sts. c. 120, § 4. The plaintiffs were in actual possession under the lease at the time of the fire. *Held*, that if the lease was recorded before the trial was finished, or perhaps even before judgment was rendered, and there was no intervening title of record, the defendant was protected, and, if the rule of evidence relative to the recording of deeds was applicable, it was satisfied by recording the lease during the arguments.

At the trial of an action for damages caused by the destruction of buildings by fire communicated by the locomotive engines of the defendant railroad, the question was raised whether the plaintiff, who was a lessee of the land and buildings thereon, was entitled to recover the full value of the buildings burnt, or whether his damages were to be confined to the injury to his possession during the unexpired term of the lease, leaving to the lessor a right of action to recover for the injury to the reversion. By the provisions of the lease it was the duty of the lessee to keep the buildings insured to an amount sufficient to repair or replace them in case of destruction or damage by fire, and to rebuild them, if burnt, unless excused by the lessor. *Held*, that the lessee was entitled to recover full damages, as if he were the bailee of the buildings, as personal property, and that his obligation to rebuild the buildings and his right to remove them and erect other buildings gave him an interest in the buildings apart from his interest in the land sufficient to enable him to recover such damages. *Held, also*, that the lessee could not be asked by the defendant if he had replaced the buildings in compliance with the lease, if the lessor had waived the lessee's obligation to rebuild, and if the lessor had taken any of the insurance on the buildings, as the liability of the defendant was to be determined on the facts as they existed at the time of the fire.

At the trial of an action for damages caused by the destruction of ice-houses by fire communicated by the locomotive engines of the defendant railroad, the plaintiff, who is a lessee of the premises under a lease requiring him to keep the houses insured to an amount sufficient to repair or replace them in case of

destruction or damage by fire, cannot be asked by the defendant the valuation of the property by the assessors for the purposes of taxation to prove the damages, or how many tons of ice he had insured in the houses when burned.

At the trial of an action for damages caused by the destruction of ice-houses by fire communicated by the locomotive engines of the defendant railroad, the defendant attempted to show by two witnesses that the ice was polluted by the sewage of a neighboring city, and therefore was unmerchantable and of little value. *Held*, that it was sufficient to say that, so far as the testimony was excluded against the objection and exception of the defendant, it did not appear that the witnesses had such actual knowledge of the condition of the pond at the time when the ice was taken from it as to make the testimony necessarily competent, and as the testimony was somewhat in the nature of an opinion or inference from facts observed at times somewhat remote from the time in question, it was in the discretion of the presiding justice to exclude it on the ground of remoteness.

TORT, under Pub. Sts. c. 112, § 214, by the plaintiffs, who were ice dealers and lessees of certain premises, including two ice-houses, alleged to have been burned by fire communicated by the locomotive engines of the defendant. At the trial in the Superior Court, before *Aldrich, J.*, the jury returned a verdict for the plaintiffs, and the defendant alleged exceptions, the nature of which appears in the opinion.

G. F. Hoar & W. A. Gile, for the defendant.

F. P. Goulding, for the plaintiffs.

FIELD, C. J. The plaintiffs were lessees of land and buildings under a lease for a term of ten years from the making thereof, and the lease at the time it was admitted in evidence had not been recorded. During the arguments at the trial, the lease was entered for record in the proper registry of deeds. The term expired on October 14, 1893, and the fire occurred in April, 1891, so that at the time of the fire there remained of the term nearly eighteen months. The contention of the defendant is, that the lease was not evidence of any title in the plaintiffs as against the defendant, because, being unrecorded, it was void under Pub. Sts. c. 120, § 4.

We understand that it was not disputed that the plaintiffs were in actual possession under the lease at the time of the fire. Section 4 of Pub. Sts. c. 120, was not intended to protect persons who claim no right, title, or interest in the premises conveyed by the unrecorded deed. That such a deed conveys the title as between the parties is clear. *Dole v. Thurlow*, 12 Met. 157. *Earle v. Fiske*, 103 Mass. 491. *Smythe v. Sprague*, 149 Mass. 310.

The cases which hold that a deed may be received in evidence if it is recorded after action brought, and before the trial, must proceed upon the ground that the delivery of the deed passed the title as between the parties to it, although the parties to the suit may not be the same as the parties to the deed. It seems to have been regarded as a rule of practice that the deed must be recorded at some time in order to be admissible in evidence. *Wolcott v. Winchester*, 15 Gray, 461, 467. *Howland v. Crocker*, 7 Allen, 153. See *Burghardt v. Turner*, 12 Pick. 534; *Palmer v. Paine*, 9 Gray, 56.

In *Estes v. Cook*, 22 Pick. 295, there was no evidence of any actual possession of the lots by the plaintiff, and the ruling was that an unrecorded deed of wild land is not of itself sufficient evidence of possession by the grantee to entitle him to maintain *trespass quare clausum* against a third person. See *Bates v. Norcross*, 14 Pick. 224; *Kellogg v. Loomis*, 16 Gray, 48; *Perry v. Weeks*, 137 Mass. 584.

In the present case the defendant did not justify on the ground that it was the owner of, or had any interest in, the property covered by the lease. The plaintiffs were in actual possession. Actual possession of real property under a claim of right is a sufficient foundation for an action of trespass, so far as injury to the possession is involved in the suit. In this case the buildings were destroyed, and the extent of the plaintiffs' title was material on the question of damages. The only interest of the defendant in having the lease recorded, if it has any interest, is that it may be protected against suits by other persons to whom the lessors may have conveyed the premises before the fire without notice of the lease, and who may put their conveyance on record before the lease has been recorded. If the lease is recorded before the trial is finished, or perhaps even before judgment is rendered in the suit, and there is no intervening title of record, the defendant is protected, and if the rule of evidence which has been heretofore adopted is to be applied to such a case as the present we think it was satisfied by recording the lease during the arguments.

The principal question in the case is whether the plaintiffs are entitled to recover the full value of the buildings burnt, or whether their damages are to be confined to the injury to their

possession during the unexpired term of the lease, leaving to the lessors a right of action to recover for the injury to the reversion. The general rule of the common law is, that when real property is permanently injured the tenant in possession for life or a term of years and the reversioner each has a cause of action, to recover damages according to the extent of the injury to the estates of each.

The lease in this case contained the following stipulations: "And in addition to the rents to be paid as aforesaid the said party of the second part agrees to keep all the said buildings, appurtenances, and improvements in good repair, and also to maintain an amount of insurance upon all of said buildings sufficient to repair or replace them in case of destruction or damage by fire. Said repair and insurance to be at the cost of said party of the second part, and it is expressly understood and agreed by said party of the second part that, if any building shall be destroyed or damaged by fire, it shall be rebuilt or repaired by said party at once, unless this requirement shall be waived by the party of the first part, in which case all moneys received by and in the hands of the party of the second part for insurance on the damaged or destroyed property shall be promptly paid to said party of the first part, their heirs or assigns. If said party of the second part shall desire to alter or remove any building, appurtenances, or improvements on said premises, or to place any new building, appurtenances, or improvements upon the same, it shall be lawful and proper to do so, provided that all such operations shall in no wise impair the value of said premises, its buildings, appurtenances, and improvements as they now exist."

The defendant, if liable at all, is liable for the whole damages to the property, and these damages cannot be increased or diminished by reason of any contracts between the lessors and the lessees. *Burt v. Merchants' Ins. Co.* 115 Mass. 1. The part of the property burnt in which the lessors as well as the lessees have an interest is the buildings. If two suits are brought, one by the lessees and one by the lessors, it is of course possible that the sum of the damages recovered may be more or less than if entire damages are recovered in one suit. It usually has been considered that in two suits there is some danger that the

damages may in the aggregate be enhanced beyond what is a reasonable compensation for the injury, and this as well as the convenience of assessing the entire damages in one suit is probably the reason why statutes have been enacted in certain cases for the assessment of entire damages in a single suit, and an apportionment of them between the different owners, or the appointment of a trustee to receive the damages for the owners of estates in succession. Pub. Sts. c. 49, §§ 18-31. There are, however, no statutes which affect the present case, and we assume that the rule of the common law would apply if the lessees and the lessors were merely the owners of successive estates in the property, without modification by contract between them. But by the provisions of the lease it was the duty of the lessees to rebuild the buildings burnt unless they were excused from this duty by the lessors. The lessees might have removed the buildings if they had not been burnt, and erected other buildings, provided the value of the premises and the buildings was not impaired thereby. If the plaintiffs should perform their covenants contained in the lease, the lessors will not be injured by the fire. The cost of rebuilding may not be exactly the same as the damages for the buildings recovered in this suit, but if buildings as valuable as the old are erected upon the land by the lessees, the lessors will suffer no loss. The argument is that this is not a case of waste; that the lessees would not be liable to the lessors for the consequences of the fire independently of their liability on the covenants of the lease; that the covenants do not affect the legal titles of either the lessors or the lessees, and therefore that the effect of the covenants cannot be considered in this action. The lessors, it is said, cannot be compelled to rely solely upon these covenants, and cannot be deprived of their action against the railroad company to recover the damages to their estate in the property. But if the lessors should recover damages against the railroad company according to their title they would hold them, not for their own use, but for the use of the lessees, if the lessees should perform their covenants. If it should cost the lessees more to rebuild than the damages recovered, this is the lessees' loss; if it should cost less, and if the buildings erected should be as valuable to the lessors as the buildings burnt, this is the lessees' gain. The lessees have

the right to make restitution *in specie*, and if this is done during the term the lessors cannot complain. If the question was of the value of the lessees' term, it would be estimated with the burdens and benefits of the covenants connected with it according to the stipulations of the lease. The effect of these covenants is almost, if not quite, enough to make the buildings personal property as between the parties. It is settled that a bailee in possession of personal chattels can recover full damages for an injury by a stranger to the property. *Brewster v. Warner*, 136 Mass. 57. And in certain cases a tenant in possession of real property having a limited interest is permitted to recover full damages for a trespass. *Rockwood v. Robinson*, 159 Mass. 406. *Attersoll v. Stevens*, 1 Taunt. 183. See *Walter v. Post*, 6 Duer, 363; *Cook v. Champlain Transportation Co.* 1 Denio, 91; *Austin v. Hudson River Railroad*, 25 N. Y. 334.

In this case we think that the lessees are entitled to recover full damages for the destruction of the buildings as if they were the bailees of the buildings as personal property, and that their obligation to rebuild the buildings and their right to remove them and erect other buildings gave to the lessees an interest in the buildings apart from their interest in the land sufficient to enable them to recover such damages. It does not appear that the lessors are not content that entire damages should be recovered by and paid to the plaintiffs in this action. If the lessors have any interest in the damages they can, before they are paid, intervene by proper proceedings.

The questions asked of the witness Carpenter were immaterial. The liability of the defendant to the plaintiffs must be determined on the facts as they existed at the time of the fire. What was done afterwards between the lessors and lessees does not concern the defendant. The valuation of the property by the assessors for the purposes of taxation was incompetent to prove the damages. The insurance was wholly *res inter alios*.*

* The defendant's counsel asked Albert G. Carpenter, one of the plaintiffs, who was a witness for the plaintiffs, if he had replaced the buildings in compliance with the lease, if there was any waiver on the part of the lessors of the lessees' obligation to rebuild, if the lessors had taken any of the insurance on the buildings, what valuation was put on the property by the assessors for purposes of taxation and if he knew the amount for which it was

Upon the question of the value of the ice destroyed by the fire, the defendant attempted to show that the ice was polluted by the sewage of the city of Worcester, and therefore was not merchantable and was of little value. The testimony of witnesses Allen and Gray on this subject, with the objections and exceptions thereto, is set out in the bill of exceptions from the stenographer's report of the testimony. It is sufficient to say, that, so far as this testimony was excluded against the objection and exception of the defendant, it does not appear that the witnesses had such actual knowledge of the condition of the pond at the time when the ice was taken from it as to make the testimony necessarily competent. The testimony was somewhat in the nature of an opinion, or of an inference from facts observed at times somewhat remote from the time in question, and we think that it was in the discretion of the presiding justice to exclude the testimony on the ground of remoteness.

The remarks of the presiding justice during the trial, which the defendant contends were improper statements of fact, do not appear to have been excepted to. *Exceptions overruled.*

JAMES DOYLE, administrator, vs. FITCHBURG RAILROAD
COMPANY.

Middlesex. March 9, 12, 1894. — June 29, 1894.

Present: FIELD, C. J., HOLMES, KNOWLTON, & MORTON, JJ.

Personal Injuries — Negligence — Employee or Passenger within Meaning of Statute — Contract on Back of Railroad Ticket — Penal Statute.

An employee of a railroad company was furnished by it each month with a ticket which contained more rides than were necessary in travelling to and from his work, and on which he was at liberty to ride whether in the service of the company or on his own private interests or pleasure. On the back of the ticket was a contract, one clause of which was as follows : " The person accepting this

assessed, and how many tons of ice he had insured in the icehouses when burned. The judge, on the plaintiffs' objection, excluded all the questions, and the defendant excepted.

free ticket thereby and in consideration thereof assumes all risk of accidents, and expressly agrees that the company is not a common carrier in respect to him, and shall not be liable under any circumstances, whether of negligence of its agents or otherwise, for injury to the person, or for loss or injury to the property, of the passenger using this ticket." While travelling on the ticket, on his own personal business, when his time was his own, he was killed in a collision caused by the gross negligence of an engineer in the employ of the company. *Held*, in an action by his administrator for damages under Pub. Sts. c. 112, § 212, that at the time of the injuries the plaintiff's intestate was not in the employment of the defendant within the meaning of the statute; that he was a passenger; and that the contract on the back of the ticket, in considering which the fact that the statute was a penal one was to be borne in mind, did not operate to release the defendant from liability.

A person may at one time be an employee when passing over a railroad, and at another time in passing over the same road be a passenger, though continuing all the while in a popular sense in the employment of the railroad company.

TORT, to recover damages for the death of the plaintiff's intestate Cornelius J. Doyle.

The declaration, which was in two counts, alleged that the action was brought by the plaintiff for his own benefit, as the father and next of kin of the intestate. The answer was a general denial, and that "the deceased was riding upon a train of the defendant under an express contract and agreement, by which he released the defendant from all liability on account of the alleged injuries."

At the trial in the Superior Court, without a jury, before *Dunbar, J.*, there was evidence tending to show that Cornelius J. Doyle had been for about a year and a half employed as a clerk in the freight department of the defendant at Boston; that he was not employed for any stated period, but was at liberty to quit the employment at any time, and the defendant might discharge him at any time, without breach of contract; that his wages were fixed at a daily rate; that during his employment and at the time of the injury he lived with his father in Waltham, and usually went each morning and evening to and from Boston on the defendant's trains; that his work for the defendant closed each day at six o'clock and began in the morning at seven, and he performed no services for the defendant while riding on its trains, or outside the freight office; that after six o'clock on Saturday afternoons he had nothing more to do for the defendant until Monday morning, and the time in the interval was his; that there was a well known

and uniform custom of the defendant, known to Cornelius J. Doyle, to furnish to its employees who worked at Boston and lived at some other place on the line of the road a ticket in the form hereinafter set forth, without other compensation than that the person receiving the ticket should perform services for the defendant in accordance with the terms of his employment; that the rate of wages paid to the defendant's employees for a given class of work was the same, whether the employee resided at the place where he worked or at some other place on the line, and was furnished one of the aforesaid tickets; that the deceased was given one of these tickets when he began work, and during the whole time thereafter he had been furnished monthly with tickets of this character, and had used them for transportation between Boston and Waltham; that each ticket had sixty-two numbers to be punched, and was good for sixty-two rides during the month for which it was issued; and that it was conceded that a person holding one of these tickets might ride upon it whether he was going to and from his work or not, and whether or not he was at the time travelling in the service of the company, or solely for his own private interests or pleasure.

The face of this ticket read as follows:

"No. 464 Fitchburg Railroad. Employee's Monthly Ticket. (Not Transferable.) Pass C. J. Doyle, S. F. D., between Boston and Waltham, during the month of September, 1892, unless otherwise ordered. Not good unless countersigned by L. W. Bartlett. Sept. 1, 1892. John Adams, Gen'l Supt. Counter-signature, L. W. Bartlett."

On the back of the ticket were the following conditions:

"The person accepting this Free Ticket thereby and in consideration thereof assumes all risk of accidents, and expressly agrees that the company is not a common carrier in respect to him, and shall not be liable under any circumstances, whether of negligence of its agents or otherwise, for injury to the person, or for loss or injury to the property, of the passenger using this ticket."

On Saturday, September 10, 1892, the deceased left his work at the usual hour, intending to return as usual on the following Monday, and went on the defendant's train home to Waltham, arriving there before seven o'clock. In the evening, after supper, he went to Boston over the defendant's road solely on a

business or pleasure trip of his own, in no way connected with the defendant. At a little before a quarter past ten the same evening he entered a car of the defendant which left Boston at that hour, and took a seat, to be carried to Waltham. While so returning from this trip to Boston and riding on said car by virtue of said ticket, which was punched by the conductor, and while in the exercise of due care, another train of the defendant collided with the car in which the deceased was riding, and he was killed. The collision was caused by the gross negligence of an engineer in the employ of the defendant.

The defendant asked the judge to rule that upon this evidence the plaintiff could not recover. The judge refused so to rule, and ruled that there was sufficient evidence upon which to base a finding for the plaintiff, and made such finding accordingly; and the defendant alleged exceptions.

G. A. Torrey, for the defendant.

G. L. Mayberry, for the plaintiff.

MORTON, J. It is conceded that the death of the plaintiff's intestate was due to the gross negligence of an engineer in the employ of the defendant. The defence rests on two propositions, first, that the plaintiff's intestate was not a passenger, but an employee; secondly, if that is not so, that the defendant is not liable by reason of the conditions on the back of the ticket.

The statute is as follows: "If by reason of the negligence . . . of a corporation operating a railroad, . . . or of the unfitness or gross negligence or carelessness of its servants, . . . while engaged in its business, the life of a passenger, or of a person being in the exercise of due diligence and not a passenger or in the employment of such corporation, is lost, the corporation shall be punished," etc. Pub. Sts. c. 112, § 212. We do not think that at the time of the injury the plaintiff's intestate was "in the employment" of the defendant within the meaning of the statute. The defendant was not transporting him to or from the place of his daily labor pursuant to the arrangement which existed between them. It had no control or authority over him. He was not travelling on any service for it. His time was his own, and the defendant was not paying him for it, and he could use it as he saw fit, and he was passing over the defendant's road entirely for his own business or pleasure.

So long as he was working from day to day for the defendant, it might be said, in a popular sense, that he was in its employment. But we do not think that is the sense in which the words are used in the statute. Otherwise, if at any time, under any circumstances, passing over the railroad on a highway crossing on Sunday, for instance, on an errand to get a doctor for his father or a friend, he was injured by the gross negligence of the defendant's servants while engaged in its business, he would have no right of recovery. Nothing but the plainest language would warrant such a construction.

Was he a passenger? This question is a more difficult one, and there is force in the argument that to hold that he was a passenger would subject the defendant to a higher degree of care towards him when travelling on its road on his own pleasure than when travelling pursuant to some purpose connected with his service as an employee. Nevertheless, we think that he must be regarded as having been a passenger. It is clear that a person may at one time be an employee when passing over a railroad, and at another time in passing over the same road be a passenger, though continuing all the while, in a popular sense, in the employment of the railroad company. The ticket on which the plaintiff's intestate was riding was not a mere gratuity. It furnished part of the consideration by which he was induced to enter the employment of the defendant. A ticket was given to him each month, and it contained more rides than were necessary in travelling to and from his work. It is expressly conceded that persons holding these tickets could use them for their own private interest or pleasure; and we think the result must be that the plaintiff's intestate held towards the defendant the relation of a passenger at the time when he was injured. The cases to which the defendant has referred us are distinguishable from this. Those in this State were where the plaintiff was being transported in immediate connection with his employment. *Gillshannon v. Stony Brook Railroad*, 10 Cush. 228. *Seaver v. Boston & Maine Railroad*, 14 Gray, 466. *Gilman v. Eastern Railroad*, 10 Allen, 233. *O'Brien v. Boston & Albany Railroad*, 138 Mass. 387. In the cases in other States the circumstances under which the injuries occurred were such that the plaintiff could at the time fairly be said to be in the

employ of the defendant. *Russell v. Hudson River Railroad*, 17 N. Y. 134. *Vick v. New York Central & Hudson River Railroad*, 95 N. Y. 267. *Abend v. Terre Haute & Indianapolis Railway*, 17 Am. & Eng. Railroad Cas. 614. *International & Great Northern Railway v. Ryan*, 82 Tex. 565. *Kansas City, Memphis, & Birmingham Railroad v. Phillips*, 98 Ala. 159. *Parkinson Sugar Co. v. Riley*, 50 Kans. 401. *Evansville & Richmond Railroad v. Maddux*, 134 Ind. 571. *Manville v. Cleveland & Toledo Railroad*, 11 Ohio St. 417. *O'Connell v. Baltimore & Ohio Railroad*, 20 Md. 212. *Hutchinson v. York, Newcastle, & Berwick Railway*, 5 Exch. 343. *Tunney v. Midland Railway*, L. R. 1 C. P. 291.

In considering the contract on the back of the ticket, the fact that the statute is a penal one must also be borne in mind. The word "damages" is not used in a strictly legal sense. *Sackett v. Ruder*, 152 Mass. 397, 403. Damages are to be assessed not less and not more than a certain amount, and with reference to the degree of culpability of the corporation, its servants or agents. Originally the remedy was by indictment. Afterwards it was extended to an action of tort. St. 1871, c. 381, § 49. St. 1874, c. 372, § 163. St. 1881, c. 199, §§ 1, 6. But only one of the remedies can be pursued by the executor or administrator. And whether the amount is recovered by indictment or in an action of tort, it goes in either case to the widow and children and next of kin, and the executor or administrator has no interest in it. It is in substance a penalty given to the widow and children and next of kin, instead of to the Commonwealth, and as such the intestate could not release the defendant from liability for it. *Commonwealth v. Vermont & Massachusetts Railroad*, 108 Mass. 7, 12. *Commonwealth v. Boston & Lowell Railroad*, 134 Mass. 211. *Littlejohn v. Fitchburg Railroad*, 148 Mass. 478, 482. Save as a matter of convenience, the proceedings properly enough might be instituted by the widow and children or next of kin, if the statute permitted it, as is done in certain instances under the employers' liability act. St. 1887, c. 270, § 2. We have not found it necessary to consider whether a release of damages for causing the death of a human being is or is not justified by public policy, though a statute has been enacted recently which seems to authorize such a release by express

messengers. St. 1894, c. 469, § 2. Upon that, however, we express no opinion. The result is that we are of opinion that the exceptions must be overruled, and it is

So ordered.

MICHAEL F. MURPHY vs MARY E. BARNARD & others.

Suffolk. December 12, 1893. — September 5, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP,
& BARKER, JJ.

*Assignment of Mortgage — Constructive Notice — Payment of Principal to
Mortgagee after Assignment.*

One who purchases from the mortgagee a mortgage which the latter has previously sold and transferred to another by an assignment duly recorded takes with constructive notice of want of title in his vendor; and although the mortgage and mortgage note are in the possession of his vendor, and are delivered with the assignment, the second purchaser takes no better title than that of his vendor, and must re-assign and deliver up the note and mortgage to their true owner. A mortgagor who, relying merely upon his own supposition that the mortgage is still owned by the mortgagee, who has in fact sold it and has no authority from its owner to collect the principal, after the note has become overdue and without the production of the note, makes payments of principal to the mortgagee, is not protected as against the owner of the note by the fact that at the time of payment the mortgage note is in the possession of the mortgagee in his office in another city.

BILL IN EQUITY, filed January, 10, 1893, by the mortgagor of certain land in Chelsea, against Mary E. Barnard, Caroline E. Patch, Henry H. Letteney, and Eben Hutchinson, Junior, to redeem the land from a mortgage made to Eben Hutchinson, Senior, on October 24, 1887, to secure a note of that date for \$2,200, payable to the order of the mortgagee in four years, with interest semiannually.

Hearing in the Superior Court, before *Bond, J.*, who found the facts, and reported the case for the determination of this court. The material facts appear in the opinion.

The case was argued at the bar in December, 1893, and afterwards was submitted on the briefs to all the judges.

J. A. Brackett, for the plaintiff.

S. L. Whipple, for Mary E. Barnard.

S. H. Tyng, for Caroline E. Patch.

BARKER, J. In this cause it is necessary to decide two controversies, one as to the amount which the plaintiff must pay to redeem his land, and another as to the ownership of the mortgage. Both controversies arise from the frauds of Hutchinson, the original mortgagee, who not only has twice sold the mortgage as his own property, but has, after having sold it, received large payments from the mortgagor, who made them supposing that Hutchinson was still the owner of the mortgage. The mortgage was made on October 24, 1887, to secure a note of that date payable to the order of the mortgagee in four years, with half-yearly interest, and was recorded on the next day. The mortgage and note were held and owned by the mortgagee until January 14, 1888, when they were sold by him to Mrs. Patch for the sum of \$2,200. She took an assignment in the usual form, and caused it to be recorded. The note was indorsed in blank, and delivered to her with the assignment, the mortgage deed, and an insurance policy procured by the mortgagee. At the same time it was arranged between her and the mortgagee that the latter should collect the interest as it should become due, retain that which had then accrued, and remit to her that which should accrue. Three days later an assignment of the mortgagee's interest in the insurance was written on the face of the policy, and the assent of the insurers was added on the following day. All these documents were kept by Mrs. Patch until June 25, 1890. In the mean time an instalment of interest was paid to her by the mortgagee, and she indorsed on the note, "May 10, 1888. Interest received to April 24, '88, \$66." The mortgagee was an attorney at law doing a real estate loan business, and had an office in Boston and another in Chelsea. On April 24, 1890, he represented to Mrs. Patch that he ought to have the documents relating to the loan, and a paper signed by her to enable him to collect the interest. He prepared a paper for her to sign, and by false and fraudulent representations as to its purpose and contents induced her to sign it. It was in fact an assignment of the mortgage from her to one Letteney,

a clerk in his office, and was dated April 24, 1890, and witnessed by the mortgagee and acknowledged before him as a justice of the peace. Mrs. Patch had made no indorsement on the note except that of May 10, 1888, and before June 25, 1890, at some time when she had the note at the mortgagee's office, he indorsed on it the four other payments of interest then accrued. On June 25, 1890, he induced Mrs. Patch to deliver to him the mortgage, note, insurance policy, and her assignment, and gave her a receipt stating that the mortgage was to be held by him for the "collection of interest, etc."

On November 14, 1890, he sold and assigned the mortgage to Miss Barnard, and received from her \$2,200. He represented to her that he owned the mortgage, and said nothing about the assignment to Mrs. Patch, or that from Mrs. Patch to Letteney. Before the transfer was completed Miss Barnard told him that she wanted a search of the registry, and he asked if she had any one in mind to do it, and as she replied that she had not, he mentioned a young man in his office who could do it, and the young man went out and she waited for him to return, when he reported that it was all right. It did not appear in evidence who this man was, or whether he made a search and no charge was made for the search. All this was done at the mortgagee's office in Boston, and the note, the mortgage, the insurance policy, and the assignment to Miss Barnard were all delivered there. Miss Barnard's home was in Michigan. She took the mortgage with her, leaving her assignment with the mortgagee to be recorded and then sent to her, and the insurance policy was also left with him to be transferred to her. He was to collect the interest and send it to her. He requested her to leave the papers with him, and, upon her objecting, he explained that the maker of the note might desire to see the interest indorsed on it, and she left the note with him. He sent to her the interest due April 24, 1891, and in October or November, 1891, the interest due October 24, 1891, and also that to become due April 24, 1892. The assignment of April 24, 1890, from Mrs. Patch to Letteney, an assignment dated October 14, 1890, from Letteney to the mortgagee, and the assignment of November 14, 1890, from him to Miss Barnard, were all recorded on March 16, 1891.

The report finds that Miss Barnard had no actual knowledge of the assignment to Mrs. Patch, or of that from her to Letteney, or of that from Letteney to the mortgagee, and that in buying the mortgage she did not rely on them, but believed that the mortgagee held the note and mortgage as the original owner; that she did not see the assignment written into the insurance policy, although she had the opportunity so to do, and that nothing was said to her by the mortgagee, or by the person who went out to examine the records, about any of the assignments. The interest due October 24, 1890, was paid by the plaintiff to the mortgagee on October 25, 1890, but it is not stated whether that payment has ever been indorsed upon the note. Miss Barnard contends that, because the debt is the principal thing in the purchase and sale of a mortgage, and the mortgage an incident to the debt, her rights are to be settled upon the facts relating to the note; and that as she purchased in good faith and for full consideration, before maturity, a negotiable promissory note from the payee having possession of it, she took an absolute title, although her vendor had none. She also contends that Mrs. Patch was negligent in leaving the note and mortgage in the hands of the mortgagee, and that as between Mrs. Patch and herself the former must bear the loss.

The report shows that Miss Barnard bought in good faith and without actual notice. But her purchase was not the purchase of negotiable paper *simpliciter*. While the title of one who buys ordinary commercial paper in good faith and before its maturity is not vitiated by the fact that there were suspicious circumstances which might have put him upon inquiry, (*Smith v. Livingston*, 111 Mass. 342, and *Freeman's National Bank v. Savery*, 127 Mass. 75,) there is a distinction between the purchase of such paper and that of notes known to be secured by mortgage of real estate, although bought as negotiable paper. *Strong v. Jackson*, 123 Mass. 60. The effect of the distinction is that subsequently acquired rights in mortgage notes will not be allowed to supplant rights previously acquired, if all the facts taken together, and including the means of knowledge and any circumstances which should lead to inquiry, show that such a result would be inequitable. If

Miss Barnard's rights as against Mrs. Patch were to be settled on this basis, the fact that Miss Barnard saw the insurance policy on which the assignment to Mrs. Patch was indorsed would be of some importance. But her title is not to be so settled. She did not buy a mortgage note only, but the mortgage also. And when the transaction is in terms the purchase of a mortgage as both a debt and a conditional estate in land, the distinction becomes decisive, because of the doctrine that the purchaser of a mortgage is charged by statute with constructive notice of the state of the record title, when, as in the present case, the record discloses not only a want of title in his vendor, but the fact that the title to the mortgage was in the person who now claims adversely to the purchaser. One who purchases under such circumstances is not a purchaser without notice, but with constructive notice of the want of title of his vendor. In the present case, Miss Barnard knew that in buying the note she was buying a mortgage, and in determining her rights as against those of the real owner of both note and mortgage she is to be charged with knowledge of the facts of which as purchaser of the mortgage she had constructive notice, namely, that the note and mortgage had been sold by her vendor to Mrs. Patch on January 14, 1888, and that Mrs. Patch continued to be the record owner of the mortgage. Miss Barnard therefore was not a purchaser without notice, but with a constructive notice of an infirmity in the title of her vendor; and, as he had in fact no title, she took none as against the owner. Nor is she aided by the fact that when she made her purchase the unrecorded assignments from Mrs. Patch to Letteney and from Letteney to Hutchinson were in existence, and in the hands of Hutchinson.

The counsel of Miss Barnard contends that the examiner must have known of these assignments, and relied upon them; and that, as she relied upon the statement of the examiner, she in effect relied upon the assignments, so that, as against her, Mrs. Patch cannot claim that the assignment was procured by fraud. But the report does not find that the examiner knew of the assignments, and we cannot infer that because he was a young man in Hutchinson's office he did know of them. Her instructions to him were only to make a search of the registry.

Upon the report, the assignment from Mrs. Patch to Letteney was not a merely voidable instrument, but was utterly void. It was not delivered as an assignment of the mortgage, but as a paper authorizing Hutchinson to collect the interest. Hence the rule that title will pass to a *bona fide* purchaser for value from one who has a conveyance voidable for fraud is not applicable in this case. The principle which protects those who in good faith hold or claim under instruments bearing a genuine signature, which the maker has written supposing that he was signing an instrument of some other description, is that the maker has negligently allowed what appears to be a valid instrument to go out with his signature, and as against those who innocently rely upon it is estopped from denying its genuineness. This principle applies only in favor of those who have acted on the faith of his signature, and in this case Miss Barnard knew nothing of the assignment which Mrs. Patch had executed, nor of that from Letteney to Hutchinson, and did not rely upon either of them. She cannot claim that Mrs. Patch is estopped from showing that the assignment to Letteney was void for fraud. Nor is the contention that Mrs. Patch was negligent in leaving the note and mortgage in the hands of Hutchinson sustained by the report. He was an attorney at law, doing a real estate loan business in two cities, and it is not negligence to intrust to such a person the custody of a note and mortgage. The result is, that as between these two defendants Mrs. Patch is, in the opinion of a majority of the court, the owner of the note and mortgage, and that Miss Barnard must assign and deliver them to Mrs. Patch.

In determining whether the plaintiff is entitled to have credit for his payments of principal,* other facts are important. These payments were made after the note became due. The plaintiff had no actual knowledge of any assignment or transfer of the mortgage, or the note, and made all his payments upon his own supposition that the mortgagee still owned and held the note and mortgage. When the payments were made, the note was in the possession of the mortgagee, but the payments were made in

* After the note became due the plaintiff paid to the mortgagee \$1,900 on account of the principal of the mortgage debt, and shortly thereafter the mortgagee absconded.

Chelsea, and the note was in the mortgagee's office in Boston ; and at none of the times of payment did the plaintiff see the note, nor was anything said to or by him about its ownership, nor did he ever receive any information or make any inquiry as to the ownership or possession of the note or mortgage until after he had made all the payments. The report finds that the mortgagee had no express authority to receive any portion of the principal, "and no authority except such as might be implied from their leaving the note with him," and "that the note was left with him for the purpose of enabling him to collect the interest, and for no other purpose." While authority to collect principal as well as interest might be implied from the fact that the owner of a note left it with an attorney at law, that inference cannot fairly be drawn when the other facts of the transaction are considered, and we must take it as a fact that Hutchinson had no authority to receive payments of principal.

It is conceded by the defendants, that the plaintiff is not charged with constructive notice of the recorded assignments. See *George v. Wood*, 9 Allen, 80. The plaintiff contends that the assignee of a note and mortgage must give notice of the assignment to the mortgagor to protect himself against future payments to the mortgagee. There is authority in decided cases for this doctrine ; but it is based upon the fact that the mortgages with which the courts were dealing were given to secure the payment of bonds or other non-negotiable evidences of debt. For instance, in *James v. Johnson*, 6 Johns. Ch. 417, 427, where it is said to be "an obvious principle of equity, that all dealings with the mortgagee, even in his character of mortgagee, before notice of the assignment, are valid," and in the other New York cases relied on by the counsel for Mrs. Patch the debt was evidenced by a bond. See also *Matthews v. Wallwyn*, 4 Ves. 118 ; *Williams v. Sorrell*, 4 Ves. 389. And so it was in *Emery v. Gordon*, 6 Stew. 447. In *Crane v. March*, 4 Pick. 131, 135, decided in 1826, it is said : "In the form usually practised in regard to mortgages, until lately, . . . the collateral personal security was a bond." But with the use of negotiable promissory notes as the personal obligation which the mortgage secures, a different element comes in. The obligation is to whoever under the law of negotiable paper may be entitled to exact payment of

the note, and the duty for the performance of which the mortgage is security is to pay according to the law of negotiable notes. In *National Bank of North America v. Kirby*, 108 Mass. 497, 502, notes secured by mortgage are said to be of the class whose value, due to their negotiable character, should not be impaired, and in *Morris v. Bacon*, 123 Mass. 58, it is treated as a familiar rule that the debt is the principal and the mortgage an incident. In *Strong v. Jackson*, 123 Mass. 60, 64, it was said: "As between the original parties, the note and mortgage are but one transaction, and but one security." In that transaction the mortgagor who gives his negotiable note, rather than a bond or some non-negotiable obligation, brings himself voluntarily within the rules which govern the payment of negotiable paper, and in effect agrees that he will be bound by them, and that the mortgage shall stand as security for the obligation that he will not only pay the note, but make effectual payment to the party entitled to claim under these rules. In determining who that party is, as in *Strong v. Jackson*, if there are different persons, each of whom has some show of title, legal or equitable, matters may be material which would not have weight in the case of purely mercantile paper; but when the true owner has been ascertained, the question between him and the promisor whether payments made by the latter are effectual to reduce or discharge the debt must be decided, not by the law applicable to bonds or other non-negotiable securities, but by the law of negotiable paper.

Applying the doctrines of that law, a majority of the court is of opinion that the payments in question were made by the plaintiff at his own risk and peril, and he is not entitled to have them applied in reduction of the amount to be paid upon redeeming the mortgage. *Wheeler v. Guild*, 20 Pick. 545, 553. As there said, "Faith is given to the holder mainly on the ground of his possession of the bill, ready to be surrendered or delivered, and the actual surrender and delivery of it upon the payment or transfer. If therefore, upon such payment, the holder has not the actual possession of the bill ready to be delivered, and does not in fact surrender it, but gives a receipt or other evidence of the payment, and if it turns out that the party thus receiving had not a good right and lawful authority to receive and collect the money, but that another person had such right, the payment will not discharge the party paying, but

will be a payment in his own wrong; he must pay the bill again to the right owner."

In the case at bar, while the person to whom the payments were made had in a sense the possession of the note, the payments were made in one city while the note was in another, and it was never produced to the plaintiff, and never ready to be either surrendered or indorsed at the time and place of the plaintiff's payments. He was not induced to make them by the fact that the note was in the constructive possession of Hutchinson at another place, nor warranted in relying upon that fact as a justification of his payments.

The plaintiff further contends that, because the mortgagee to whom he paid was an attorney at law and an agent of the real owner of the note to collect the interest, the real owner is bound by the payments of the principal. If the plaintiff had been induced to make the payments of principal by the fact that the mortgagee was an attorney who was agent of the real owner of the note, and he had been ignorant of any limitation of the attorney's authority, we should be slow to hold that the payments would not bind the real owner. See *Donaldson v. Wilson*, 79 Mich. 181; *Emery v. Gordon*, 6 Stew. 447. But we need not consider that question, because it does not arise upon the facts. The plaintiff was unacquainted with the fact that the mortgagee was an agent of some owner of the note, and was not thereby induced to make the payments. He made them solely because he himself assumed, without inquiry and without any representations made, and without requiring the production of the note, that the mortgagee continued to be its holder and owner, and he dealt with him as owner, and not as an agent.

Nor can the plaintiff rely upon the doctrine that one who allows an undisclosed agent to appear and act as principal is not permitted afterwards to deny that he had full authority. The cases relied on by the plaintiff, like *Fish v. Kempton*, 7 C. B. 687, were where the agent had authority to sell, and when he was allowed to sell as a principal the legal consequences of such a sale must follow. But here the mortgagee as agent was given no authority or right to hold himself out as a principal, nor is it shown that he was allowed to do so by the real owner, who had no reason to suppose that the agent was acting outside of the authority given him.

It cannot be said that the owner of the note was negligent in leaving it with the mortgagee, who was an attorney at law and also engaged in another respectable business, and no reason is shown to have been known to her why she should distrust him. Nor is the case one where, if one of two innocent persons must suffer from the wrongful act of a third, the plaintiff should be relieved from the consequences of his payment to the wrong party. The owner of the note was not the cause of his making the payments, and did not induce him to make them; but he acted solely upon his own supposition that the mortgagee was himself the owner of the note and mortgage.

The result is that, in the opinion of a majority of the court, the plaintiff is not shown upon the report to be entitled to have his payments on account of principal applied in reduction of the amount which he must pay to redeem. We have not all the data which are essential to the making of a final decree, and the case is sent back to the Superior Court for further proceedings, and that court is to enter a decree for redemption.

So ordered.

NEW YORK AND NEW ENGLAND RAILROAD COMPANY vs.
RAILROAD COMMISSIONERS.

Suffolk. March 6, 1894. — September 5, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP,
& BARKER, JJ.

*Certiorari — Constitutional Law — Law of Ways of Necessity in its
Application to Railroads.*

The St. 1892, c. 171, entitled "An Act to require railroad companies to maintain crossings to give access to lands cut off by railroads," is constitutional, and applies where one conveys a part of his land to a railroad in such form as to deprive himself of access to the remainder.

The law that, if one conveys a part of his land in such form as to deprive himself of access to the remainder of it unless he goes across the land sold, he has a way of necessity over the granted portion, applies to the conveyance of land for a railroad by a warranty deed which says nothing about a right of way across the land conveyed and the use to be made of it, although the description shows that a railroad is located there, and a clause in the deed releasing damages to the grantor's estate "by reason of the location or construction" of the

railroad cannot be construed as a release of the way of necessity to his land beyond; and the fact that the railroad provided and maintained a farm crossing for him for many years indicates that the stipulation was not understood to apply to his right of way.

KNOWLTON, J. These are three petitions for writs of certiorari, brought against the board of railroad commissioners, all involving the same questions. It appears that in 1877 the Rhode Island and Massachusetts Railroad Company laid out and constructed a railroad, which has since been leased to the petitioner for a long term of years. The railroad ran through land of Mancy M. Daniels, John Sullivan, and the predecessors in title of Susan S. Poor and Henry Poor. From each of these owners the corporation took a warranty deed in common form of the land belonging to the grantor included in its location. In each case the situation of the line was such that the railroad cut off the grantor from access to a part of his farm unless he crossed over the railroad, and in each case the corporation constructed a farm crossing over the railroad, which was maintained and used without objection until about the year 1891, when it was closed and the landowner excluded from it by the present petitioner. Soon afterwards the Legislature passed the St. of 1892, c. 171, the first section of which is as follows: "When any person or corporation is cut off from access to lands owned by such person or corporation by the laying out of a railroad or the widening of the roadbed of such railroad, and when no compensation has been paid by the company owning or operating said railroad for cutting off access to said lands, or agreement made relative thereto, the railroad commissioners, after due notice to the parties in interest and a hearing, under such rules as they shall adopt for proceedings under this act, shall, if they deem expedient, order a crossing to be made and maintained at the expense of the railroad company; and shall specify definitely the character of such crossing, and when the same may be used." Under this statute an application was made to the board of railroad commissioners by each of the three parties whose crossing had been closed, and the present petitioner was ordered in each case to construct a crossing and allow it to be used at the place where the crossing had formerly been. The petitioner brings these petitions asking to have the proceedings of the rail-

road commissioners set aside on the ground that the statute is inapplicable to cases like these, and that it is unconstitutional.

If the statute assumed to create a right of way where none before existed, and to put upon railroad corporations the burden of establishing and maintaining crossings for private persons over land held by a railroad corporation under a perfect title subject to no rights or privileges, it might well be held unconstitutional.

These cases present a different question. By each of the land-owners a warranty deed was given, which says nothing about a right of way across the land conveyed. But it is familiar law that if one conveys a part of his land in such form as to deprive himself of access to the remainder of it unless he goes across the land sold, he has a way of necessity over the granted portion. This comes by implication from the situation of the parties and from the terms of the grant when applied to the subject matter. The law presumes that one will not sell land to another without an understanding that the grantee shall have a legal right of access to it, if it is in the power of the grantor to give it, and it equally presumes an understanding of the parties that one selling a portion of his land shall have a legal right of access to the remainder over the part sold if he can reach it in no other way. This presumption prevails over the ordinary covenants of a warranty deed. *Brigham v. Smith*, 4 Gray, 297.

In an ordinary case of a sale by warranty deed like those in the cases before us, it is clear that no compensation would be deemed to have been paid for cutting off access to the grantor's remaining land, for there would still be a right of access which could be enforced. Apart from the use of the location for railroad purposes, we presume it would hardly be contended that the rule would not apply to these cases. If the railroad had never been operated, or if the use of it for railroad purposes should cease, it is clear that the grantor in each case should have a way of necessity to his remaining land. The petitioner's cases must, therefore, rest on the contention that a different rule should apply to the conveyance of land for a railroad from that applied to other conveyances. In the first place, there is nothing expressed in either of the deeds in regard to the use which is to be made of the land, although the description shows that a railroad is located there, and in one of the deeds there is a

release of damages growing out of the location and construction of the railroad.

But in regard to ways of necessity, we fail to find any different principles established in respect to land sold for a railroad from those applicable in other cases. When a sale is made of a narrow strip of land through the centre of a farm, the presumption that the parties do not intend to leave the grantor with no means of reaching or using the land beyond the strip sold is certainly as strong as when land is sold in other shapes which would require a way of necessity of much greater length. In these cases the parties recognized the reasonable rule by maintaining farm crossings for many years. Our statutes apply the same rule of policy in this respect to ways across railroads as across other lands. When land is taken for a railroad and the parties fail to agree about damages, it is the duty of the county commissioners, on application, not only to estimate the damages, but to order the construction and maintenance of such structures for the security and benefit of the owner as they judge reasonable. Pub. Sts. c. 112, § 113. *White v. Boston & Providence Railroad*, 6 Cush. 420. *Keith v. Cheshire Railroad*, 1 Gray, 614. *Boston Gas Light Co. v. Old Colony & Newport Railway*, 14 Allen, 444, 445. See also Pub. Sts. c. 112, § 138. Under this statute the county commissioners often order a farm crossing where access to the land beyond may be had by going around through public ways, as well as where the situation would give a way of necessity. When land is taken, the title to it for ordinary railroad purposes is as good as when it is conveyed by a warranty deed, but the statutes have always recognized the necessity and propriety of securing rights of way for landowners over the railroad. Our decisions hold that, when land over which there is no public way is *taken* for a railroad, there is no right of crossing it except as prescribed by the county commissioners, but the statute assumes that the county commissioners when requested will establish crossings where they are reasonably necessary. We find nothing in the law in regard to the use of railroads which controls the ordinary presumption that, when one has sold a narrow strip of land through his farm, the parties expect him to have a passageway across the strip to reach his land beyond, if he has no other means of access to it.

Until the passage of St. 1892, c. 171, there was no statute applicable to cases like these. It is quite proper that the rights of the parties in such cases should be defined. It was within the power of the Legislature to regulate the mode of exercising these rights for the safety and convenience of all concerned. The landowner has the right of way by operation of law. The burden of constructing and maintaining the way is put by the Legislature on the railroad corporation, not for the benefit of the landowner, but for the protection of the public. The exercise of such a right is attended with possible risk to passengers and to those using the way, and the Legislature may well put upon the railroad company the obligation of keeping its railroad safe for use. *Norwood v. New York & New England Railroad*, 161 Mass. 259. Railroad companies cannot justly complain at being compelled to allow persons a convenient opportunity of using and enjoying their property where there has been no agreement, and no consideration for an agreement, to give up the use of it.

The clause in Sullivan's deed releasing damages to his estate "by reason of the location or construction" of the railroad we do not construe as a release of the way of necessity to his land beyond. Very likely there were damages from the construction of the road which had no connection with access to his land. The fact that the corporation provided and maintained a farm crossing for him for many years indicates that this stipulation was not understood to apply to his right of way. If there are facts which favor a different construction, the petitioner might have shown them. There is nothing in either of the cases to show that the way of necessity which was created by the conveyance has ever been extinguished by subsequent proceedings, and the rights of the parties must therefore be determined upon the deeds.

A majority of the court are of opinion that the statute was intended to apply to cases like these, and that no compensation was paid by the company for cutting off access to the lands, and no agreement was made relative thereto.

Petitions dismissed.

F. A. Farnham, for the petitioner.

No counsel appeared for the respondents.

JOSEPH WALKER & others vs. JOHN STETSON, JR.

Suffolk. March 12, 1894. — September 5, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Party Wall.

An addition to a party wall made by one of two adjoining owners of land entirely on his own land, for the purpose of strengthening and thickening the wall and foundation so as to support a higher building, does not become a part of the party wall, and the other adjoining owner who subsequently uses the wall as strengthened in increasing the height of his building, but who does not project his timbers beyond that portion of the wall standing on his land, though liable under his deed to pay for the half of the original division wall erected on his land, cannot be restrained from making such use of the addition, or made liable for a portion of its cost.

BILL IN EQUITY, filed March 17, 1893, to restrain the defendant from making use of an addition made by the plaintiffs to a certain party wall running from Boylston Street to Providence Street in Boston, between adjoining parcels of land belonging respectively to the plaintiffs and the defendant.

Hearing before *Lathrop, J.*, at whose suggestion a statement of the facts was agreed upon by the parties, which subsequently, on account of the illness of the presiding justice, was presented to *Knowlton, J.*, who reported the case for the consideration of this court. If the bill could be maintained, the case was to stand for further hearing, or such other order or decree was to be made as equity required. If it could not be maintained, it was to be dismissed, unless the plaintiffs desired to amend it by changing it into an action at law, in which case they should have leave so to do, unless this court should be of opinion that an action at law could not be maintained. The material facts appear in the opinion.

The case was argued at the bar in March, 1894, and afterwards was submitted on the briefs to all the judges.

J. Walker, pro se.

B. L. M. Tower, (P. F. Hall with him,) for the defendant.

MORTON, J. The plaintiffs and defendant respectively derive title through mesne conveyances from the city of Boston. The

deeds from the city of Boston to their predecessors in title provide that the owner of the premises conveyed may build one half of the division walls on the adjoining lots, "which half of the walls, when used by the owners of the adjoining lots for building purposes, is to be paid for by them to the extent so used." In all the mesne conveyances this provision as to party walls was either set out in terms, or incorporated by reference. Under it, a party wall had been built along the entire line between their estates, by predecessors in title of the plaintiffs and defendant. On the front portion, i. e. towards Boylston Street, it was twelve inches thick, and formed a party wall for two brick buildings three stories high. The respective owners for the time being paid each one half the cost of this wall. The rest of the wall was built by the defendant's predecessors in title, and no part of the cost has been paid either by the plaintiffs or their predecessors in title.

The plaintiffs acquired title in March, 1890, and proceeded to erect a six-story building eighty feet in height, and covering their entire lot. They carried up the party wall to the same height. In doing so, it became necessary to thicken and strengthen it, and also to strengthen the foundation. This was all done on the premises of the plaintiffs at their own expense, and without any request, consent, or permission on the part of the defendant, unless it can be implied in law or from the facts.

The defendant acquired title in May, 1891, after the plaintiffs had completed the erection of their building, and also erected a six-story building, eighty feet in height, and covering his entire lot. In erecting his building, the defendant inserted the timbers into the wall between his premises and those of the plaintiffs four inches, and no more. The timbers do not extend beyond his own land, and are wholly within the one half part of the old wall and the additions in height made thereto which stand on his own land. He added nothing to the height, thickness, or foundation of the wall.

The old party wall, as carried up with the additions made to it by the plaintiffs, constitutes one solid wall. The plaintiffs introduced testimony tending to show that in respect to height, thickness, foundations, and general character it was such a wall as good construction required between such buildings, and that

the old wall, if carried up of the same thickness, would not have been sufficient. There was also testimony that the old wall, if carried up as it was, would not have conformed to the building law in force in the city of Boston. St. 1885, c. 374, § 52. St. 1892, c. 419.

The defendant has offered to pay to the extent to which he has used the old party wall as carried up by the plaintiffs. But the plaintiffs contend that the defendant is in effect using the whole wall as thickened and strengthened by them, and that they are entitled in addition to compensation for the use of the additions which they have made to the wall in thickening and strengthening it, and for the use of the land taken for those purposes, or, if they are not, that the defendant should be enjoined from making any use of the wall as thickened and strengthened to support the building which he has erected.

A majority of the court do not see how either contention can be supported. We assume that either party had a right to carry up the party wall to any reasonable height, provided he did not thereby impair the wall as it stood, nor injure the other party; *Everett v. Edwards*, 149 Mass. 588; *Matthews v. Dixey*, 149 Mass. 595; and that the other party was bound to pay when he used it to the extent to which he used it, and that the obligation to pay attached to successive additions in height as they were made by one party or the other. But we do not see on what ground the defendant can be compelled to do any thing more than he has offered to do. The deeds certainly contain no agreement compelling him, and we do not see how one can be implied. *Allen v. Evans*, 161 Mass. 485. The additions made to the wall by the plaintiffs for the purpose of thickening and strengthening it are not, in any proper sense, a party wall. They were made by the plaintiffs on their own land, for their own purposes. They belong to them. They can remove them if they see fit so to do. The defendant has no right of support in them. If he could acquire such a right by prescription, the plaintiffs can prevent him by taking the proper steps. Pub. Sts. c. 122, § 3. Possibly a party wall may, by agreement, be placed on the land of one of the parties. But there is no such agreement here, and the defendant refused to make one. In the absence of such an agreement, we think that it would be going

too far to hold that, under deeds which provide that one half of the party wall may be placed on land of the adjoining owner, any additions made by one owner on his own land to a party wall so built, for the purpose of thickening and strengthening it, so that he may build a higher building, or a building adapted to a different use, become a part of the party wall, and that the adjoining owner is liable for a portion of their cost, though he uses the party wall no further than he has a right to use it.

No doubt, as long as his building stands and the wall stands the defendant will get a benefit from the additions made by the plaintiffs for the purpose of thickening and strengthening the wall. But that does not create a liability on his part, nor take away his right to use the party wall as carried up by the plaintiffs. *Allen v. Evans*, 161 Mass. 485. If there had been no party wall, and the plaintiffs had built their wall, as they would have had the right to do, so that its exterior surface coincided through its height and breadth with the dividing line, and the defendant had afterwards built similarly on his side, it is very probable that he would have been able to use a thinner wall, on account of the support which it would probably receive from the plaintiffs' wall; but that would have given the plaintiffs no claim on the defendant. *Kingsland v. Tucker*, 115 N. Y. 574. In the present case the defendant has not trespassed at all upon the plaintiffs. He has not inserted his timbers into the party wall as far as he had a right to. It is obvious that whether the additions made by the plaintiffs were a party wall cannot be determined by the demands of good construction, or the requirements of the city ordinances. We do not, therefore, see on what ground the defendant can be compelled to pay for the additions which the plaintiffs have made for the purpose of thickening and strengthening the wall or its foundations, nor enjoined from using it as he is doing.

As to the remedy, it is well settled in this State that an action at law will lie to recover of one using a party wall his proportion of the cost of the same. *Savage v. Mason*, 3 Cush. 500. *Cutter v. Williams*, 3 Allen, 196. *Maine v. Cumston*, 98 Mass. 317. *Standish v. Lawrence*, 111 Mass. 111. *Richardson v. Tobey*, 121 Mass. 457.

The defendant admits his liability to the extent to which he

has used the old party wall, so far as it forms a part of that carried up by the plaintiffs. In accordance, therefore, with the terms of the reservation, the plaintiffs are to have liberty, if they desire, to amend into an action at law; otherwise, the bill is to be dismissed, with costs.

Ordered accordingly.

COMMONWEALTH vs. DANIEL M. ROBERTSON.

Bristol. June 18, 1894. — September 5, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Statute — Transfer of Cases and Form of Order in the Supreme Judicial Court — Indictment for Murder by stabbing with a Knife — Description of Wound — Allegations conformable to Declaration of Rights — Allegation sufficiently stating the Time of Death — Photographs as Evidence.

The St. 1892, c. 127, entitled "An Act authorizing the transfer of cases in the Supreme Judicial Court," was intended to give to the full court, upon application of a party, full power to determine the place of hearing questions of law in any case, including capital cases, and it does not take away the jurisdiction of the justices before whom the trial is had to make such prior orders as are authorized by Pub. Sta. c. 153, § 16, or by St. 1891, c. 879.

The St. 1892, c. 127, entitled "An Act authorizing the transfer of cases in the Supreme Judicial Court," gives jurisdiction as soon as questions have been put in form for hearing, so that nothing remains to be done but to make the formal entry of them in the full court which Pub. Sta. c. 153, § 15, directs the clerk to make "as soon as may be"; and there is no good reason why they should first be entered in the county where the trial is had, and then transferred to Suffolk or some other county.

An order of this court recited that whereas on a certain date application was made to the Supreme Judicial Court, sitting as a full court in the county of Suffolk for the Commonwealth, by the Attorney General, praying that the exceptions in a capital case be assigned and heard by the full court sitting at Boston for the Commonwealth, upon which application the parties were heard by the full court; it was ordered that the questions of law arising upon the exceptions be assigned and heard by the full court sitting at Boston for the Commonwealth on a specified day and at a certain hour. *Held*, that the form of the order was sufficient, and that the words "assigned and heard by the full court sitting in Boston" are equivalent to "entered and heard by the full court" sitting in Boston.

An indictment for murder by stabbing with a knife need not allege in what way or in which hand the knife was held.

An indictment for murder, which avers that the death ensued from "one mortal wound" given on the head of the deceased by a knife, is sufficient without a more specific description of the wound.

The provisions of Article XII. of the Declaration of Rights, which secure to the accused person the right to have his crime or offence "fully and plainly, substantially and formally, described to him," only require such particularity of allegation as may be of service to him in enabling him to understand the charge and to prepare his defence.

In an indictment for the murder of M. R., the day of the assault was given, the assault resulting in a mortal wound was described, and then followed the words "of which said mortal wound the said M. R. then and there died." *Held*, that the words "then and there" related to the time previously stated in the indictment as the time of the assault, and that they sufficiently stated the time of the death.

On the trial of an indictment for murder, photographs taken only three hours after the homicide, showing the condition of the premises at the time of the discovery of the crime, and verified to the satisfaction of the court, are admissible in evidence to assist the jury in understanding the situation of affairs at the time and place of the commission of the homicide; and the fact that the defendant did not deny the killing does not affect the competency of the evidence.

INDICTMENT, in one count, for murder. The indictment was as follows :

"The jurors for the said Commonwealth, on their oath and affirmation present, — That Daniel M. Robertson of New Bedford in the county of Bristol, at New Bedford in the county of Bristol, on the ninth day of September in the year of our Lord eighteen hundred and ninety-three, in and upon one Mary Robertson feloniously, wilfully, and of his malice aforethought an assault did make, and with a certain weapon, to wit, a knife, which the said Daniel M. Robertson then and there held, her, the said Mary Robertson, feloniously, wilfully, and of his malice aforethought did strike, cut, stab, and thrust in and upon the head of her, the said Mary Robertson, giving to her, the said Mary Robertson, by the striking, cutting, stabbing, and thrusting in and upon the head of her, the said Mary Robertson, one mortal wound, of which said mortal wound the said Mary Robertson then and there died.

"And so the jurors aforesaid, upon their oath and affirmation aforesaid, do say that the said Daniel M. Robertson the said Mary Robertson, in manner and form aforesaid, then and there feloniously, wilfully, and of his malice aforethought did kill and murder, against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided."

Trial in the Superior Court, before *Mason*, C. J., and *Dunbar* and *Sheldon*, JJ., who allowed a bill of exceptions, in substance as follows.

Before the jury were impanelled the defendant filed a motion to quash the indictment for the following causes: 1. Because the indictment contains no sufficient allegation or description how the defendant held the knife. 2. Because the mortal wound is not sufficiently described. 3. Because there is no allegation or description in the indictment upon what part of the head the mortal wound was inflicted. 4. Because the indictment contains allegations of several wounds, and it does not sufficiently appear which wound was the mortal wound. 5. Because the time of death is not alleged, whether instantaneous or not.

The court overruled the motion, refusing to quash the indictment, and ruled that the indictment was sufficient. The defendant excepted. The government, in opening its case to the jury, contended that the crime charged was murder in the first degree, that is, murder with deliberately premeditated malice aforethought, and disclaimed that it was murder in an attempt to commit a crime punishable with death or imprisonment for life, or murder committed with extreme atrocity or cruelty, and stated that it would claim a verdict for murder in the first degree. The defendant did not deny the killing, but contended that it was manslaughter, or murder in the second degree.

It appeared that the deceased came to her death by means of an incised wound on the left side of the face, inflicted by the defendant with an ordinary case-knife which had been used in the family as a carving-knife for several years, and had been sharpened from time to time as it became dull; that there were upon her body other incised wounds inflicted by the defendant at the same time and with the same knife, to wit, one cut upon the outer part of the left arm above the elbow and extending below the elbow, one cut upon the inside of the left arm, two cuts back of the right ear, a cut upon the right shoulder, a cut upon the forehead, and also a cut passing through the left cheek at a point in the line of the left corner of the mouth and the left ear-hole, about midway on that line, being the same cut first above mentioned.

It was contended by the government that this last wound, as above described, alone caused her death. The government offered in evidence three photographs, taken about three hours after the homicide, which photographs were numbered one, two,

and three; numbers one and two being different views of the kitchen where the alleged murder occurred, and number three being a view of the chair and body in the dining-room. There was evidence that the objects shown were in the same condition at the time of taking the photographs as at the time of the killing. The photographer who took them testified that they were correct views at the time they were taken of the objects in the rooms. The defendant objected to the admission of these photographs and of their inspection by the jury, but the court admitted them, and they were inspected by the jury, and the defendant excepted.

The court, against the defendant's objection, permitted these several photographs to be taken by the jury into the jury-room, and the defendant excepted. There was evidence tending to show deliberately premeditated malice aforethought.

The Attorney General, in his closing argument, held up to the jury the photograph numbered three, and said to them: "When you hear of the community outraged by a crime of atrocity, of the unspeakable atrocity of this crime, duty will say to you, you had a chance to help prevent these things. Nay, when you come to the close of your life, duty will hold before you that dreadful picture, and will speak to you through the lips all bleeding and silent, 'Why did you say that I could be killed in my own house, doing my duty, doing no wrong, and my crime not be avenged?'"

The jury were duly and properly instructed as to the several degrees of murder, and were further instructed that upon the case as made by the Commonwealth they could not convict the defendant of murder in the first degree except upon proof of deliberately premeditated malice aforethought, and could not convict the defendant of murder in the first degree upon the ground that the murder was committed under circumstances of extreme atrocity and cruelty. No exception was taken to any part of the instructions of the court, nor any objection to the argument.

The jury returned a verdict of guilty of murder in the first degree; and the defendant alleged exceptions.

E. L. Barney & L. LeB. Holmes, for the defendant.

H. M. Knowlton, Attorney General, (*G. C. Travis*, First Assistant Attorney General, with him,) for the Commonwealth.

KNOWLTON, J. The defendant contends that this bill of exceptions is not properly before the court, and that therefore it cannot now be considered. The St. 1892, c. 127, is as follows: "The Supreme Judicial Court, sitting as a full court in any county or for the Commonwealth, shall have jurisdiction of all questions of law and of all cases and matters at law or in equity, civil or criminal, arising in any other county than that in or for which it is sitting, and which might properly come before and be heard and determined by the full court sitting for such other county; and, upon an application of one or more of the parties, a majority of the justices of said court shall, in their discretion, have power to order any such questions of law, or case, or matter to be entered and heard by the full court sitting in any county or at Boston for the Commonwealth." Before the enactment of this statute questions of law arising in other counties where the full court is accustomed to sit might sometimes be heard before that court sitting in Suffolk. Under Pub. Sts. c. 153, § 16, such a hearing may be had by consent of all parties filed in the case, or by order of the judge before whom the trial was had, if he "deems the exception or appeal frivolous, or intended for delay merely, or that the interests of the parties or the public require a more speedy determination thereof than can be reached in the terms established for the county in which the trial is had," etc. Under St. 1891, c. 379, § 2, and under the amendatory statute of 1894, c. 204, exceptions arising on the trial of an indictment for a capital crime may be "entered and determined either at the law sitting of the Supreme Judicial Court held for the county in which they arise, or, upon the order of the justices before whom the trial is had, at the law sitting of the Supreme Judicial Court for the Commonwealth." The defendant's counsel argued that this last provision is exclusive, and that St. 1892, c. 127, is not applicable to exceptions arising in a capital case. But we do not so understand the law. This last mentioned statute was intended to give to the full court, upon application of a party, full power to determine the place of hearing questions of law in any case, and it does not take away the jurisdiction of the justices before whom the trial is had to make such prior orders as are authorized by Pub. Sts. c. 153, § 16, or by St. 1891, c. 379.

It is also urged in behalf of the defendant that the jurisdiction under St. 1892, c. 127, does not arise until after the questions of law have been formally entered in the full court for the county where the trial was had, or in the full court for the Commonwealth, if the justices before whom the trial was had have made an order for an entry there. But the language is broad enough to give jurisdiction as soon as questions have been put in form for hearing, so that nothing remains to be done but to make the formal entry of them in the full court which the law directs the clerk to make "as soon as may be." Pub. Sts. c. 153, § 15. There seems to be no good reason why they should first be entered in the county where the trial is had, and then transferred to Suffolk or some other county. We think the jurisdiction of the court attaches to make an order in regard to the entry as soon as the questions are ripe for entry, and that it is immaterial whether the application to the full court is made before or after the entry which the law requires when there is no application.

The form of the order in the present case is sufficient. The words "assigned and heard by the full court sitting at Boston" are equivalent to "entered and heard by the full court" sitting in Boston.*

The defendant filed a motion to quash the indictment, which was overruled. Of the causes on which the motion was founded the fourth was waived at the argument, and the others are as follows: 1. Because the indictment contains no sufficient allegation or description how the defendant held the knife. 2. Because the mortal wound is not sufficiently described. 3. Because

* The exceptions were allowed by the justices of the Superior Court and filed in the Superior Court for Bristol County, April 30, 1894. May 5, 1894, an order was passed, and thereupon sent to the clerk at Taunton, as follows: "Supreme Judicial Court. Bristol ss. Commonwealth by Indictment vs. Daniel M. Robertson. Order. Whereas, on the fourth day of May, A. D. 1894, application was made to the Supreme Judicial Court, sitting as a full court in the County of Suffolk for the Commonwealth of Massachusetts, by the Attorney General, praying that the exceptions in said case be assigned and heard by the full court sitting at Boston for the Commonwealth; upon which application the parties have been heard by the full court. It is Ordered, that the questions of law arising upon the exceptions in said case be assigned and heard by the full court sitting at Boston for the Commonwealth, on the eighteenth day of June, A. D. 1894, at nine and one half o'clock in the forenoon. W. A. Field, C. J. S. J. C. May 5, 1894."

there is no allegation or description in the indictment upon what part of the head the mortal wound was inflicted. 5. Because the time of death is not alleged, whether instantaneous or not.

1. It is not necessary that the indictment should state in what way nor in which hand the knife was held. This was settled in *Commonwealth v. Costley*, 118 Mass. 1, 21.

2. We are of opinion that the indictment need not contain a particular description of the wound; it is enough to allege that it was mortal. In *Commonwealth v. Woodward*, 102 Mass. 155, which was an indictment for manslaughter, this subject was fully considered, and it was held that there is no good reason for requiring a description of an incised wound, any more than of a bruise; and it was said that if the authorities would support the position that a description of an incised wound is necessary, "the tendency of modern jurisprudence and legislation is such as to justify, if not to require, a departure from the old rule of pleading, in a matter which is, practically, so nearly one of mere form." The doctrine of this case meets our approval.

3. What we have said in regard to the second objection to the indictment applies also to the third. The allegation that the wound was upon the head of the deceased is sufficient, without a more definite statement of the place. Such an allegation, if made specific, need not be exactly proved. *Commonwealth v. Coy*, 157 Mass. 200, 214, and cases cited. The provisions of Article XII. of the Declaration of Rights, which secure to the accused person the right to have his crime or offence "fully and plainly, substantially and formally, described to him," only require such particularity of allegation as may be of service to him in enabling him to understand the charge and to prepare his defence.

4. It is objected that the time of the death is not stated with sufficient accuracy. The day of the assault is given, viz. September 9, 1893; the assault, resulting in a mortal wound, is described; and then follow the words "of which said mortal wound the said Mary Robertson then and there died." It is contended that, instead of the words "then and there," the word "instantly" should have been used. There can be no doubt that the words "then and there" relate to the time previously stated in the indictment as the time of the assault, and we are of

opinion that they sufficiently state the time of the death. The important fact which must appear in the indictment is that the death occurred within a year and a day after the assault which caused it. Any more particular statement of the time must be regarded as an immaterial allegation which need not be proved as made. The form of the indictment in this particular is that of the fourth count, which was approved in *Commonwealth v. Webster*, 5 Cush. 295, 322, and of the third count in *Commonwealth v. Coy*, 157 Mass. 200, 203, and of both counts in *Commonwealth v. Holmes*, 157 Mass. 233. See also *State v. Haney*, 67 N. C. 467.

5. The photographs were properly admitted. They were taken only three hours after the homicide, showing the condition of the premises at the time of the discovery of the crime, and they were verified to the satisfaction of the court. They would naturally be expected to assist the jury in understanding the situation of affairs at the time and place of the commission of the homicide. *Blair v. Pelham*, 118 Mass. 420. *Randall v. Chase*, 133 Mass. 210. The fact that the defendant did not deny the killing does not affect the competency of the evidence. The plea was not guilty, and it does not appear that there was any admission until after the Commonwealth had introduced its evidence ; but if the admission was made at the outset, the Commonwealth was not bound to accept it and omit the formal proof of that part of its case. It was entitled to present the issue to the jury with all the evidence legitimately bearing upon it.

Exceptions overruled.

**BARNABAS CLARKE vs. RACHEL A. SCHWARZENBERG,
executrix, & another.**

Suffolk. May 18, 1894. — September 6, 1894.

Present: FIELD, C. J., HOLMES, KNOWLTON, LATHROP, & BARKER, JJ.

*Beneficiary Association — Creditor — Dependent — Statute — Disposition
of the Proceeds of the Certificate.*

Under the Pub. Sta. c. 115, § 8, (as amended by the St. of 1882, c. 195, § 2,) in force when a certificate was issued by a beneficiary association, a member could not designate one who was merely a creditor as a beneficiary; and legislation passed since the issuing of the certificate up to July 23, 1893, the date of the decease of the assured, has not so changed the status of the beneficiary as to entitle him to recover.

The fact that the designation of the beneficiary in a certificate issued by a beneficiary association was invalid, does not render the whole contract void, and on the death of the assured his executor is entitled to the money in trust for the benefit of those who at the time the contract was made were entitled to be named as beneficiaries.

LATHROP, J. This is a bill in equity against the first named defendant as executrix of the will of her husband, Moses H. Schwarzenberg, and in her own right, and against the Massachusetts Benefit Association. From the pleadings and the report of a single justice, upon which the case is reserved for our consideration, the following facts appear.

On May 5, 1885, the Massachusetts Benefit Association issued to Moses H. Schwarzenberg a benefit certificate, under seal, by the terms of which, in consideration of the payment of fifteen dollars by Moses H. Schwarzenberg, and the agreement on his part to accept certain conditions and rules as a part of the contract, the association constituted Schwarzenberg a benefit member, and agreed "to pay to Barnabas Clarke (a dependent), if living, if not to the heirs at law of said Barnabas Clarke, in sixty days after satisfactory proof of the death of said member, a sum equal to the amount received from a death assessment, but not to exceed five thousand dollars."

The conditions and rules provide, among other things, for an

annual payment of six dollars, and for the payment of an additional assessment of eleven dollars and seventy-five cents, upon the death of any member.

On May 7, 1885, the plaintiff and Schwarzenberg executed the following instrument:

"Boston, May 7, 1885. I, Moses H. Schwarzenberg, of Boston, in consideration of one dollar to me paid by Barnabas Clarke, of said Boston, and for no other consideration except moral and equitable ones, hereby promise and agree to pay to said Clarke, his heirs, executors, and assigns, on the 15th day of May current, the sum of twenty-five dollars, and upon the 15th day of each and every month hereafter the sum of twenty-five dollars until said payments shall amount to the sum of twenty-seven hundred and forty-five dollars and 94 cents, together with interest thereon from date. To secure the payment of said sum I have given to said Clarke an insurance policy upon my life for \$5,000 in the Mutual Benefit Association, which policy the said Clarke, for himself, his heirs and assigns, hereby agrees to transfer to Rachel A., the wife of the said Moses H., in case said sum of \$2,745.94 and interest paid before the death of the said Schwarzenberg, and in case of his death before such payment then said Clarke agrees to pay out of any money received from said policy all that sum which may be left after payment of said \$2,745.94 and interest, or any balance due thereon, to the said Rachel A.

"The said Clarke does not agree to do any other or further thing than is above set forth, except that he promises to aid the said Moses H. in his business as far as he conveniently can."

The policy referred to in this agreement as being in the Mutual Benefit Association was so stated by a mistake. It was in fact in the Massachusetts Benefit Association.

Moses H. Schwarzenberg died on July 21, 1893. There is due on the policy the sum of four thousand dollars. The plaintiff has had possession of the policy since May 7, 1885.

It is in dispute whether the parties to the agreement subsequently varied it, and what amount was due to the plaintiff from Schwarzenberg at the time of the death of the latter; and these questions are to be determined hereafter, if necessary.

There is nothing to show that the plaintiff paid any assessment, and we assume that all the assessments were paid by Schwarzenberg.

The defendant association submits itself to the direction of the court, and says in its answer that it will pay the sum of four thousand dollars to whomsoever the court directs.

Under the statutes in force when the certificate in this case was issued, a member could not designate one who was merely a creditor as a beneficiary. Pub. Sts. c. 115, § 8. St. 1882, c. 195, § 2. *Briggs v. Earl*, 139 Mass. 473. *Skillings v. Massachusetts Benefit Association*, 146 Mass. 217. *Rindge v. New England Aid Society*, 146 Mass. 286.

The question then is, whether, as contended by the plaintiff, subsequent legislation has so changed the status of a beneficiary that the plaintiff is entitled to recover. We assume, in favor of the plaintiff, that the defendant association was not an organization conducting its business as a fraternal society on the lodge system, and that it did not come within any of the other exceptions mentioned in § 1 of the St. of 1885, c. 183, and that at some time subsequently to May 21, 1885, when that statute took effect, it conducted its business so as to come within the general provisions of that chapter. See *Harding v. Littlehale*, 150 Mass. 100. We may also assume that under that statute any person may be named as a beneficiary if he has an interest in the life insured. § 10. But the whole scope of the statute is prospective in its character, and § 5, in terms, applies only to a policy or certificate "hereafter issued by any corporation doing business under this act." The same remarks are true of the St. of 1890, c. 421.

The St. of 1888, c. 429, applies only to a fraternal beneficiary association; and its beneficiaries, by § 8, can only be the husband, wife, children, relatives of, or persons depending upon, such member.

The St. of 1890, c. 341, also applies only to fraternal beneficiary associations. It amends several sections of the St. of 1888, and adds to the persons who may be beneficiaries, but does not mention creditors.

We find nothing, therefore, in the legislation subsequently to the issuing of the benefit certificate in this case which makes

valid the designation of a beneficiary who could not be so designated at the time the certificate was issued.

The case of *Dean v. American Legion of Honor*, 156 Mass. 435, which decides that a person named as a beneficiary in a certificate issued by a corporation organized under the Pub. Sts. c. 115, § 8, might, since the passage of the St. of 1888, c. 429, sue thereon in his own name, has no application to the case at bar. It was the case of a fraternal beneficiary association, and the question before the court was as to the construction of a statute which does not apply to the case at bar.

In *Tateum v. Ross*, 150 Mass. 440, the question which is now presented was not considered by the court or discussed in the opinion; and that case cannot be considered as a precedent in favor of the plaintiff.

We are therefore of opinion that the plaintiff is not entitled to recover any part of the proceeds of the policy.

The remaining question is whether the first named defendant is entitled to receive the proceeds of the certificate; and we are of opinion that she is. Though the designation of the beneficiary was invalid, this did not render the whole contract void. The executrix is entitled to the money in trust for the benefit of those who at the time the contract was made were entitled to be named as beneficiaries. *American Legion of Honor v. Perry*, 140 Mass. 580. *Daniels v. Pratt*, 143 Mass. 216. *Rindge v. New England Aid Society*, 146 Mass. 286. *Burns v. Ancient Order of United Workmen*, 153 Mass. 173.

Decree accordingly.

E. C. Bumpus & W. R. Trask, (*R. F. Simes* with them,) for the plaintiff.

W. N. Buffum, for the first named defendant.

LOUIS P. OBER vs. JAMES I. BROOKS.

Suffolk. December 8, 1893. — October 17, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP,
& BARKER, JJ.*Landlord and Tenant — Contract to Purchase in Lease — Construction of Lease
— Encumbrance.*

A contract to purchase inserted in the same instrument with a demise may be independent, or may fall with the estate demised, and the usual rules of construction are to be applied in ascertaining the meaning of the whole instrument.

In a lease of certain premises for a term of twenty years from a day named, the lessors agreed to sell and convey, at any time within five years from that date, "to the said lessee or his assigns, upon his or their request, all their (said lessors) present rights, titles, interests, and estates, and all the rights, titles, interests, and estates they may have or can by all reasonable acts and efforts at law or in equity obtain or acquire at the date or time of the conveyance in and to all the aforesaid leased premises, with all the privileges and appurtenances thereto belonging." The lease also provided that in case any portion of the premises was taken for public uses during the continuance of the lease, and before the lessee should exercise his option to purchase, he should have the election to terminate the lease, or to restore the premises, at an expense to the lessor not exceeding the damages awarded for the taking; that the lessors should not be liable for any loss of rent occasioned by such taking; that the damages awarded for such loss of rent should belong to the lessee; and that, if the lessee should terminate the lease "in the manner aforesaid, or otherwise," the right or option to purchase the leased premises should "also be terminated and ended." *Held*, that the lessee's right to purchase was not an independent right, and fell with the lease.

A lease of premises for a term of years from a certain day, at an annual rent payable monthly, provided that, in case a full and complete delivery of the premises, free and clear of all encumbrances, except certain leases then in force and the rights of any tenant at will, should not be made by the lessor to the lessee on the day so named, no rent should begin to accrue until such delivery should be made. *Held*, that the lessee, having entered and acted under the lease, was bound to pay rent, and could not be heard to say that there were encumbrances other than those excepted in the lease.

A lease of premises for a term of years from a certain day at an annual rent payable monthly provided that, in case a full and complete delivery of the premises, free and clear of all encumbrances, except certain leases then in force and the rights of any tenant at will, should not be made by the lessor to the lessee on the day so named, no rent should begin to accrue until such delivery should be made. When the lease was delivered the premises were subject to mortgages, which were discharged afterwards with the proceeds of another mortgage executed and delivered on the day of such discharge, and expressly made subject to the lease, under which possession had not then been taken. *Held*, that the later mortgage was not such an encumbrance as was contemplated in the provision of the lease.

BILL IN EQUITY, filed October 12, 1892, to remove a cloud upon the plaintiff's title to certain premises on Avery Street and Haymarket Place in Boston. Hearing before *Morton, J.*, who directed a decree to be entered for the plaintiff, and, at the defendant's request, reported the case for the consideration of the full court; such decree to be entered as law and justice might require. The facts appear in the opinion.

The case was argued at the bar in December, 1893, and afterwards was submitted on the briefs to all the judges.

I. R. Clark, for the defendant.

G. Putnam, for the plaintiff.

BARKER, J. In a demise dated May 31, 1889, but in fact executed and delivered on August 2, 1889, for a term of twenty years from June 10, 1889, the lessors agreed to sell and convey, at any time within five years from June 10, 1889, "to the said lessee or his assigns, upon his or their request, all their (said lessors') present rights, titles, interests, and estates, and all the rights, titles, interests, and estates they may have or can by all reasonable acts and efforts at law or in equity obtain or acquire at the date or time of the conveyance in and to all the aforesaid leased premises, with all the privileges and appurtenances thereto belonging." * The question for decision is whether this right to purchase has been lost, the plaintiff contending that it would cease upon the termination of the estate for years, and that it came to an end on February 11, 1890, when the lessors entered for non-payment of rent, and the defendant contending that it was an independent right which would not fall with his estate for years, and also that his estate for years was not in fact terminated, because no rent had accrued when the lessors entered.

* The lease also provided that in case any portion of the premises was taken for public uses during the continuance of the lease, and before the lessee should exercise his option to purchase, he should have the election to terminate the lease, or to restore the premises, at an expense to the lessors not exceeding the damages awarded for the taking; that the lessors should not be liable for any loss of rent occasioned by such taking; that the damages awarded for such loss of rent should belong to the lessee; and that, if the lessee should terminate the lease "in the manner aforesaid, or otherwise," the right or option to purchase the leased premises should "also be terminated and ended."

We are of opinion that the right to purchase was not independent, and that the parties intended that, if the estate demised should end before the expiration of five years, the right to purchase should also end. The authorities cited by the defendant upon this branch of the case are not in point. *Shep. Touchst.* 170, deals with the increase of an estate by the happening of a condition. See *Chedington's case*, 1 Co. Rep. 153; *Lord Stafford's case*, 8 Co. Rep. 73. In *Green v. Low*, 22 Beav. 625, the right to purchase was inserted in an agreement to build, and the parties did not intend that a failure to insure in a specified office should work a forfeiture of all rights under the contract. Neither *Moss v. Barton*, L. R. 1 Eq. 474, *Buckland v. Papillon*, L. R. 1 Eq. 477, *Edwards v. Gale*, 52 Maine, 360, nor *Newman v. French*, 45 Hun, 65, supports the doctrine that a lessee can maintain an action on an agreement in his favor contained in a lease which he has broken; and in *Thompson v. Guyon*, 5 Sim. 65, a lessee who had broken some of the covenants of his lease was thereby debarred from having specific performance of a covenant for a further term.

A contract to purchase inserted in the same instrument with a demise may be independent, or may fall with the estate demised, and the usual rules of construction are to be applied in ascertaining the meaning of the whole instrument. The present indenture is a lease with an incidental right to purchase during a portion of the term, and we think it was not in the mind of either party that the right should be exercised except by a tenant. The right to purchase and the estate for years were both to commence on the same day. If they were independent, the defendant might assign the estate for years and retain the right to purchase, or might assign the estate to one person and the right to another. That the parties did not so intend is clear from the language of the clause in which the right is first mentioned, and in which it is agreed that, if the lessee shall terminate the lease, the right to purchase shall also be ended. While the agreement is to sell to the lessee or his assigns, that part of it which deals with the betterments and damages assessed or awarded before the making of a conveyance is upon the theory that the right to purchase will be exercised by a tenant. If the right were independent, the defendant might refuse to enter, and might neglect

to perform every portion of his agreement except to pay the price, and yet have during several years the right to acquire the property. Such a state of things would greatly reduce its value to the lessors. We do not think that such was the bargain, and are of opinion that the justice who reported the case was right in finding that the right to purchase would fall with the lease.

The remaining question is whether the estate for years was terminated by the entry made on February 11, 1890, for non-payment of rent. The indenture, dated May 31, 1889, and delivered on August 2, 1889, demised the property for twenty years from June 10, 1889, and the agreement was to sell at any time within five years from that date. It was not to sell the fee, but only such title as the lessors had or could by reasonable efforts acquire at the time of the conveyance. When the indenture was delivered, the property was subject to mortgages, and was in the occupation of tenants, some of whom held under unexpired written leases, and some of whom were tenants at will. The lessee agreed to extinguish at his own expense all leases or rights of these tenants if possible, he having the right to collect for his own use all rents coming due from them after June 10, 1889. There was no express stipulation that he should take possession, but a covenant to pay a rent of six thousand dollars per annum by equal monthly payments on the tenth day of each month in every year during the term, and the following stipulation was inserted at the end of the indenture, namely: "In case a full and complete delivery of the within leased premises, free and clear of all encumbrances, except the leases in force May 31st, 1888, and the rights of any tenant at will, which are to be assumed and taken care of by the lessee as before provided, shall not be made by the lessors to the lessee on the 10th day of June, 1889, then in that case no rent shall to [*sic*] commence to accrue under this lease until such delivery shall be made. Rents of existing tenants of the leased premises shall be apportioned as of the date of such delivery, and the lessors shall be entitled to that portion thereof representing the period from June 10th, 1889, to the date of the delivery, and the lessee to the remainder."

The lessors were Letitia Blakemore, widow of William Blakemore deceased, and John E. Blakemore, William B. Blakemore,

Ann E. Merrill, and Letitia B. Evans, the four persons last named being children of the deceased William Blakemore, and each of the four being married. These lessors had title as devisees under the will of William Blakemore, his widow having a life estate and the children the remainder. Even if the mortgages should be discharged, the lessors could not convey the property free from the inchoate rights of the wives of John E. Blakemore and William B. Blakemore, and of the husbands of Ann E. Merrill and Letitia B. Evans. These wives and husbands joined in the lease, not as lessors, but in token of their assent, and of their release of all rights during the term, and no longer; and they also severally covenanted that, in case of a purchase upon the specified terms, they would join in the deeds, in token of their release of all rights in the property. But this covenant was to the lessee and his assigns, and not to the lessors.

The mortgages outstanding at the delivery of the indenture were discharged on November 2, 1889, with the proceeds of another mortgage executed and delivered on that date, and expressly made subject to the lease. Thereupon the lessors demanded that the defendant should take possession under the lease. This he orally refused to do, stating that he believed that the encumbrances were not all removed; and also stating in writing that he was ready to take possession whenever the premises should be free of encumbrances except as provided in his lease, and that he was also ready to take immediate possession, with the understanding that he should not thereby waive or affect his right to the removal of all encumbrances except as provided in his lease, including in such removal the mortgage of November 2, 1889. This proposition was not assented to by the lessors, and was repeated by the defendant and again not accepted; and on December 3, 1889, the lessors wrote to the defendant tendering him immediate possession, claiming that the premises were free of all encumbrances except as provided in the lease. On December 6, 1889, the defendant took possession, protesting that the premises were not free of encumbrances, and claiming a right under the lease not to pay rent while encumbrances existed. On January 4, 1890, no rent having been paid to them, the lessors demanded rent under the lease. On January 10, 1890, the defendant tendered some \$206 of rent which he had collected,

due from subtenants; the tender was refused; and on January 11, 1890, payment of the rent then due was duly demanded of the defendant, and written notice served upon him that he had failed to perform one of the covenants of the lease. On February 11, 1890, the lessors entered for non-payment of rent, and repossessed themselves of the premises, and the contention of the plaintiff is that this entry terminated the defendant's estate for years, and with it his right to purchase.

In the first place, it is clear that neither the defendant's offer to take immediate possession, with the understanding that he should not thereby affect his right to removal of encumbrances, nor his protest when taking possession that the premises were not free from encumbrances, nor his then claiming a right under the lease not to pay rent while any encumbrances existed, affected his obligation to pay rent. His offers were not accepted, and his protests and claims could not vary the effect of the indenture. Although, if the premises were not free from encumbrance, that fact would have justified him in declining to take possession, the true construction of the indenture is, that, when possession should be delivered to and accepted by him, his obligation to pay the stipulated rent would begin. When he should take possession, the right of the lessors to have any other benefit from the use of the property than the payments of the rent which he was to make would cease, and we cannot think that either party intended that he might enter and have the use of the property, and collect the rents from subtenants, and then contend that, by reason of some encumbrance which might in no way affect his power to obtain revenue from the property, he was not bound to pay rent. When possession was offered him on the footing that there were no encumbrances, he had no right to enter except on the footing that he thereby became liable for rent, and even if he might have stayed out, if he went in, he was bound to pay the rent; and his failure to pay was a breach of covenant, and warranted the lessors in taking steps to end the lease. That instrument did not mean that he might enter and collect rents, and still say that he would pay no rent. It is admitted by his answer, and found in the report, that he took possession and collected rents of the tenants in occupation. The only ground on which he could do this was the authority

given him by the lease. He could not act in this way under the lease, and still be heard to say that he was exonerated from the duty of paying rent. He was in as lessee, and acted under the lease, and was bound as lessee to pay rent. He refused so to do, and the lessors by their entry determined the lease. The later mortgage, made after and expressly subject to the lease, is clearly not such an encumbrance as was contemplated in the stipulation quoted; and in our opinion, if he might have insisted that the conveyance by which the south wall of No. 6 Haymarket Place was made a party wall was such an encumbrance, and might have for that reason refused to enter, which we do not decide, he cannot be heard so to insist after having entered and acted under the lease.

We are therefore of opinion that the decree for the plaintiff should be affirmed. *So ordered.*

DANIEL SHAUGHNESSEY vs. ELLEN LEARY.

Suffolk. March 13, 1894. — October 17, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP,
& BARKER, JJ.

Easement — Prescription — Drain — User — Registry Laws — Construction of Report.

The acquisition of a prescriptive right to use a wooden drain across neighboring land is not prevented by the laying of an earthen drain inside the wooden one.

The fact that a drain is laid at the joint expense of the owners of the dominant and servient estates does not import, as matter of law, that the use thereafter is permissive.

The acquisition of a prescriptive right to use a drain for the discharge of sink water is not prevented by the use of it also for the discharge of water-closets during a part of the twenty years. On the other hand, if the prescriptive right is only to use the drain, by gaining the former right the dominant owner does not necessarily gain the latter.

The registry laws do not extinguish easements by prescription in favor of purchasers without notice.

When the plaintiff alone appeals from a decree granting him an injunction, whether the defendant can contest the right on which the injunction is founded, *quære*.

BILL IN EQUITY, to restrain the defendant from preventing the plaintiff from using and repairing a drain which ran through

the defendant's land. Trial in the Superior Court, before *Hammond*, J., who reported the case for the consideration of this court, in substance as follows.

By deed dated April 6, 1866, one Bowker conveyed to the plaintiff an estate in East Boston, described as follows: "Northwesterly by Lot 210, thirty-six feet (36 ft.); northeasterly by lot No. 1, on a plan hereinafter mentioned, seventeen feet, two and one half inches (17 ft. 2½ in.); southeasterly on lot No. 8, on said plan, thirty-six feet (36 ft.); and southwesterly by a common passageway ten feet (10 ft.) wide always to be kept open, seventeen feet, two and one half inches (17 ft. 2½ in.). The land above described is lot No. 9 on Noble's plan of subdivision of Lot 209 and part of Lot 101, Section 1, East Boston, recorded with Suffolk Deeds, April 4, 1866, with deeds given to John Kenney and Margaret Walsh. Together with the right and privilege in common with others legally entitled thereto to pass and repass on and over and through said ten-foot passageway and on, over, and through the twelve-foot passageway to Everett Street, and also of draining under said passageways in a drain to be built thereunder if any shall be so built, in common with the others thereto legally entitled; the grantee paying his proportionate part of constructing said drain and of keeping the said drain and passageways in good condition and repair, said passageways to remain forever open and unobstructed."

By deed of even date Bowker conveyed to one Cronin another estate in East Boston, described as follows: "Beginning at a point in the westerly line of a twelve-foot passageway which point is distant fifty-four feet southwesterly from Everett Street, thence the line runs by the westerly line of said passageway southwesterly thirty-six feet to the northerly line of a ten-foot passageway laid out in the rear of lots numbered 209 and 101, as shown on the plan hereinafter mentioned, then turning at a right angle and running northwesterly by the northerly line of said ten-foot passageway thirty-four feet eight and one half inches, then turning at a right angle and running northeasterly by lot numbered 7 on the plan hereinafter mentioned thirty-six feet, then turning and running southeasterly by lots numbered 3 and 4 on said last named plan thirty-four feet eight

and one half inches to the point of beginning. Being the lots numbered 5 and 6 on plan of subdivision of Lots 209 and 101 aforesaid, recorded with Suffolk Deeds, Liber 875, folio 37," followed by a provision similar to that in the deed to the plaintiff.

At the time of these conveyances, there was upon each lot a brick dwelling-house, the plaintiff's house being the north-westerly and Cronin's the southeasterly house in a block of three houses situated upon the northeasterly side of the ten-foot passageway mentioned in the deeds. On each lot in the rear of the house was an ordinary wooden privy, having a vault not connected with any drain, the vault being cleared out from time to time, as occasion required. There was also a wooden drain about a foot square, starting from the rear of the plaintiff's house, and running over the rear of each lot of the block, including the Cronin lot, in a line substantially parallel with said ten-foot passageway, and connecting with a private drain in the twelve-foot passageway mentioned in the Cronin deed, which last drain connected with the public sewer in Everett Street. The drain which thus ran in the rear of the block was used for the ordinary waste water of the kitchen in the plaintiff's house, but was not used for water-closet drainage, meaning thereby human urine and human excrement; and such use was continued by the plaintiff from the time of said conveyance to him until the year 1878, at which time, by order of the board of health, the privies and vaults were removed, and at the joint expense of the owners of the block, including the plaintiff and Cronin, a tight earthen drain about ten inches in diameter, placed about one foot below the surface of the ground, was substituted for the wooden drain, being laid inside thereof; and from that time until the earthen drain was interfered with by the defendant, as hereinafter stated, this wooden drain served no other purpose than as a covering for the new drain; and the new drain was used not only for the kind of drainage for which the wooden drain had been used, but also for the passage of water-closet drainage, water-closets having been constructed in each house and connected with the earthen drain at the time it was laid.

In June, 1888, Cronin by a warranty deed conveyed his lot

to the defendant, who, until shortly before the filing of the bill, was ignorant of the existence of the drain. As soon as she became aware of its existence, she denied the right of the plaintiff to use and maintain it, and under a claim of right stopped it up and otherwise injured it.

The judge made an interlocutory decree that "the plaintiff has the right of drainage of his waste water (excluding water-closet drainage) through the defendant's land as the drain now runs; that the plaintiff has no right to pass water-closet drainage through the defendant's land; and that forty-five days are to be given to the plaintiff to adjust his drain in accordance with his rights as herein declared; and the cause is reserved for further action on this basis." The plaintiff appealed to this court.

The case was argued at the bar in March, 1894, and afterwards was submitted on the briefs to all the judges.

W. B. Orcutt, for the plaintiff.

P. M. Keating, for the defendant.

HOLMES, J. The fact set forth in the report warranted a finding that the plaintiff had acquired a right by prescription to use the drain for waste water, excluding water-closet drainage, as it had been used for more than twenty years. The wooden drain has been there from 1866. The laying of an earthen drain inside the wooden one, taken by itself, did not interrupt the running of time in favor of the plaintiff. The fact that this was done at joint expense has no greater effect as matter of law. The owner of the now servient tenement may have joined, as well because he yielded to a paramount claim, as on the footing of a license given by him and accepted by the plaintiff. Even if the continuance of the pipe itself was not a trespass or adverse, the use of it over the servient land by the plaintiff may have been adverse just as easily when the defendant's predecessor in title partly paid for it, as if the plaintiff had laid it wholly at his own expense.

The fact that the use of the drain was greater, in the character of the substances discharged into it, after 1878, does not prevent the gaining of an easement for the less burdensome use which was continued for twenty years. The same known or discoverable thing, the drain pipe, remained unchanged in

place during the whole time. A greater or more burdensome use of the drain did not make it a different drain, nor destroy the character of such use as was continuous. The fact that a pipe from the water-closet was connected with the drain, in addition to a pipe from a sink, did not change the nature of the use from the sink. That the servient owner submitted to a greater use for a part of the time is no reason why his submitting to a less use for twenty years should not have its usual effect. And if the matter be approached from the side of the dominant owner, the feeling of right which grows out of habit certainly is no less because larger intrusions have been carried out successfully for a part of the time during which the less have been practised without dispute. *Baldwin v. Calkins*, 10 Wend. 167, 177. *Crossley v. Lightowler*, L. R. 2 Ch. 478, 481.

As the right was acquired before the defendant bought, it is not necessary to consider whether her ignorance of the existence of the drain when she took her deed would have affected the running of the necessary time. It did not put an end to the existing easement. The registry laws do not extinguish easements by prescription in favor of purchasers without notice. Pub. Sts. c. 120, § 4. See *Johnson v Knapp*, 146 Mass. 70, 73.

We have discussed the question whether the plaintiff has any right in the drain, as both parties have treated that question as open on the report. Whether it is so or not we express no opinion. *May v. Gates*, 137 Mass. 389. *Moors v. Washburn*, 159 Mass. 172, 176. *Harris v. Harris*, 158 Mass. 489.

We cannot say that the plaintiff has a prescriptive right to discharge his water-closet through the drain. As we have implied already, the judge may not have found that the drain was maintained adversely, but only that the plaintiff's use of it was adverse. If so, it is not necessary to consider whether, if a drain had been laid and maintained adversely, it would carry the right to use it for all possible purposes, without regard to the way in which it had been used in fact. If the easement is only a right to use, the right must be limited to use of the kind which has been made for twenty years.

Decree affirmed.

WILLIAM MINOT, JR. & others, executors, vs. ELISA C.
WINTHROP & others.

Norfolk. May 14, 1894. — October 17, 1894.

ANNA O. WILLIAMS vs. CHARLES P. BOWDITCH, executor.

Suffolk. May 14, 1894. — October 17, 1894.

SIMEON N. WEST & another, executors, vs. HENRY M.
PHILLIPS, Treasurer of the Commonwealth, & others.

Bristol. May 14, 1894. — October 17, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP,
& BARKER, JJ.

Tax on Collateral Legacies and Successions — Constitutional Law — Tenant for Life and Remainderman — Annuity — Exemption of Charitable Societies, etc.

The St. of 1891, c. 425, entitled "An Act imposing a tax on collateral legacies and successions," is constitutional, as the privilege of transmitting and receiving by will or descent property on the death of the owner is a "commodity" within the meaning of this word in the Constitution of Massachusetts, c. 1, § 1, art. 4, and an excise may be laid upon it; and the objections that the tax is unequal because not imposed upon all estates and upon all heirs, devisees, legatees, and distributees, and is unreasonable on account of the exemption in the proviso of the first section, "that no estate shall be subject to the provisions of this act unless the value of the same, after the payment of all debts, shall exceed the sum of ten thousand dollars," are not well founded. LATHROP, J. dissenting.

The provisions of § 2 of St. 1891, c. 425, entitled "An Act imposing a tax on collateral legacies and successions," to the effect that where property is bequeathed to a direct heir for life or for a term of years, and the remainder to a collateral heir or to a stranger to the blood, the value of the prior estate shall be appraised and deducted from the appraised value of the property, and the remainder shall be subject to a specified tax, contemplate that the tax shall be computed and deducted from the principal sum and paid over to the Treasurer of the Commonwealth, under § 4, "at the expiration of two years from the date" of the executor's bond, or when the legacy is paid, if paid within the two years; and the amount of the loss of the income of the tenant for life or for years caused by the diminution of the principal of the fund is not to be made up to him out of the principal or out of the general funds of the estate.

The St. 1891, c. 425, imposing a tax on collateral legacies and successions, contemplates in the case of an annuity that the tax is to be paid out of the annuity as soon as the annuity becomes payable, and at the time when payments on account of it are made.

The exemption under St. 1891, c. 425, § 1, of "charitable, educational, or religious societies or institutions, the property of which is exempt by law from taxation," from the payment of the tax imposed by that statute, is confined to societies the property of which is exempt from taxation by the laws of this Commonwealth.

THE FIRST CASE is an appeal by Elisa C. Winthrop, Julia G. Irving, the Congregational Church and the St. John's Episcopal Church of Canandaigua in the State of New York, from a decree of the Probate Court for the County of Norfolk upon the constitutionality of St. 1891, c. 425, and its application to certain legacies given the appellants by the will of Cornelia A. G. Winthrop. Hearing before *Lathrop*, J., who reported the case for the consideration of the full court. The facts appear in the opinion.

THE SECOND CASE is an action of contract against the executor of the will of Elizabeth B. Bowditch, to recover the balance of a legacy of \$6,000 given to the plaintiff by the will. The declaration alleged that the defendant had paid the plaintiff \$5,700, and, without requiring any bond from the plaintiff, had refused to pay the remaining \$300, solely upon the ground that he had the right to withhold that sum and pay it as a tax to the Treasurer of the Commonwealth, under St. 1891, c. 425. The declaration further alleged that the statute was unconstitutional and void. In the Superior Court the defendant demurred to the declaration, on the grounds that no legal cause of action was set forth therein and that St. 1891, c. 425, was constitutional. The Superior Court sustained the demurrer; judgment was ordered for the defendant, and the plaintiff appealed to this court.

THE THIRD CASE is an appeal by Charles F. Folger and others, legatees under the will of Richard Curtis, from a decree of the Probate Court for the County of Bristol to the effect that St. 1891, c. 425, is constitutional, and that the testator's estate, by virtue of its provisions, is subject to a tax payable to the Commonwealth. Hearing before *Knowlton*, J., who reserved the case for the determination of the full court. The facts appear in the opinion.

F. Rackemann, for the executors in the first case, read the papers.

W. G. Russell & J. Fox, for the plaintiffs in the first two cases.

A. M. Goodspeed, for Charles F. Folger and others, submitted the case on a brief.

H. M. Knowlton, Attorney General, & *G. C. Travis*, First Assistant Attorney General, for the Treasurer of the Commonwealth.

FIELD, C. J. These cases make it necessary for us to determine the constitutionality of St. 1891, c. 425. The objections urged against this statute are that the right of succession to property on the death of the owner is a necessary incident of property which is protected by the Constitution of Massachusetts; that a tax upon such succession is in effect a tax upon the property, and is subject to the limitations put upon a tax upon estates by the Constitution; that if such a tax is not a tax upon property, but an excise upon the right of succession, this right cannot be considered as "goods, wares, merchandise, and commodities," within the meaning of these words in the Constitution; and that even if the right can be considered as a commodity, the tax imposed by the statute is unreasonable, because the statute is unequal in its operation, and makes arbitrary distinctions between those persons and estates which are and those which are not subject to its provisions. The Attorney General concedes that the tax imposed by the statute is invalid if it is a tax on property or estates. He contends that the tax is an excise; that the succession to property on the death of the owner is a privilege created by law, and a commodity within the meaning of the Constitution, and that as an excise the tax is reasonable.

St. 1891, c. 425, purports to be a statute imposing a tax, and we think it apparent that the Legislature, in passing it, intended to act under the power granted to the General Court by the Constitution, to impose and levy taxes. The Constitution, c. 1, § 1, art. 4, gives to the General Court full power "to impose and levy proportional and reasonable assessments, rates, and taxes upon all the inhabitants of and persons resident and estates lying within the said Commonwealth; and also to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise, and commodities whatsoever, brought into, produced, manufactured, or being within the same; to be

issued and disposed of by warrant, under the hand of the Governor of this Commonwealth for the time being, with the advice and consent of the Council, for the public service, in the necessary defence and support of the government of the said Commonwealth, and the protection and preservation of the subjects thereof, according to such acts as are or shall be in force within the same." The Constitution also provides as follows: "And while the public charges of government, or any part thereof, shall be assessed on polls and estates, in the manner that has hitherto been practised, in order that such assessments may be made with equality, there shall be a valuation of estates within the Commonwealth taken anew once in every ten years at least, and as much oftener as the General Court shall order."

In the Constitutional Convention the committee appointed to prepare a Declaration of Rights and a Frame of a Constitution reported a draft of a Constitution which gave to the General Court in the matter of taxation only the authority "to impose and levy proportional and reasonable assessments, rates, and taxes upon the persons of all the inhabitants of and residents within the said Commonwealth, and upon all estates within the same, to be issued and disposed of by warrant," etc. This was in effect the same as in the Province Charter. This draft also contained the following provision: "And that public assessments may be made with equality, there shall be a valuation of estates within the Commonwealth taken anew once in every ten years at the least." *Journal of Convention, 1779-80, p. 197, c. 2, § 1, art. 3, of the draft.* In the Convention the paragraphs above quoted were referred to committees, who reported them in the form in which they stand in the Constitution. *Ibid.* pp. 61-63. Under the Province Charter the General Court had laid imposts and excises in addition to taxes and assessments upon the persons and estates of the inhabitants, but it is evident that the framers of the Constitution intended that the authority to do this should be express. But neither in the Province nor in England had there been a tax on legacies and inheritances at the time when the Constitution was adopted, although it was a form of taxation which had been used on the Continent of Europe. See *The Inheritance Tax*, by Max West, Vol. 4, No. 2, of the *Studies in History, Economics, and Public Law of Colum-*

bia College; Smith's Wealth of Nations, Book 5, c. 2; Dos Passos on Collateral Inheritance Taxes; Hanson's Probate, Legacy, and Succession Duties.

The descent or devolution of property on the death of the owner in England and in this country has always been regulated by law. We have no occasion in these cases to consider whether the Legislature has the power to make the Commonwealth the universal legatee or successor of all the property of all its inhabitants when they die, for the purposes not only of paying the public charges, but also of distributing the property according to its will among the living inhabitants, or for the purpose of abolishing private property altogether. We assume that under the Constitution this cannot be done, either directly or indirectly; that the Legislature cannot so far restrict the right to transmit property by will or by descent as to amount to an appropriation of property generally; that it cannot impose a tax which shall be equivalent, or almost equivalent, to the value of the property, and cannot so limit the persons who can take as heirs, devisees, distributees, or legatees that the great mass of all the property of the inhabitants must become vested in the Commonwealth by escheat. The State can take property by taxation only for the public service, and we assume that its right to take property, if any exists, by regulating the distribution of it on the death of the owner, is limited in the same manner, and that this right must be exercised in a reasonable way.

Under our system of law the right to make a will or testament, and the right to transmit or take property by descent, are now mainly, if not wholly, regulated by statute. In *Mager v. Grima*, 8 How. 490, 493, the Supreme Court of the United States say of a statute of Louisiana: "Now the law in question is nothing more than an exercise of the power which every State and sovereignty possesses, of regulating the manner and term upon which property real or personal within its dominion may be transmitted by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it." In *Brettun v. Fox*, 100 Mass. 234, this court say: "The objection of the respondent that the statute could not constitutionally limit the owner's power of testamentary disposition is equally novel and unfounded. The power to dispose of property by will

is neither a natural nor a constitutional right, but depends wholly upon statute, and may be conferred, taken away, or limited and regulated, in whole or in part, by the Legislature; and no exercise of legislative authority in this respect is more usual than that which secures to a widow a certain share in the estate of her husband." See *Lavery v. Egan*, 143 Mass. 389.

If, under the power to regulate the devolution of property on the death of the owner, the Legislature cannot take away altogether the inheritable quality of property, yet such regulations as are thought reasonable concerning the persons who may take or transmit real or personal property by will or inheritance have been made in every civilized state. Taxes on legacies and inheritances, or on succession in any form to property on the death of the owner, have generally been considered, not as taxes upon property, but as excises upon the privilege of taking or transmitting property in this way. The decision in *Curry v. Spencer*, 61 N. H. 624, that a statute imposing such a tax is in violation of the Constitution of New Hampshire, goes on the ground that the tax is not proportional, and so cannot be supported as a tax upon property under the Constitution of that State, which it seems authorizes only taxes and assessments upon polls and property. See *State v. United States & Canada Express Co.* 60 N. H. 219.

The Constitution of the United States, by Art. 1, § 8, provides as follows: "The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States." Direct taxes must be apportioned among the several States according to the respective numbers of their inhabitants, to be determined as provided by the second section of the same article. In *Scholey v. Rew*, 23 Wall. 331, the validity of the succession taxes imposed by the U. S. St. of June 30, 1864, as amended by the U. S. St. of July 13, 1866, was considered. 13 Sts. at Large, 287 *et seq.* 14 Sts. at Large, 140 *et seq.* There was no room for any contention that the Congress of the United States could regulate in the States the transmission of property by will or inheritance, and the question was whether it had authority under the taxing power to

impose such taxes. The decision was that such taxes were not direct taxes, but excises or duties, and as such within the authority of Congress to lay and collect without apportionment among the States. The decisions generally are that such taxes are excises. See *Mager v. Grima*, 8 How. 490; *In re McPherson*, 104 N. Y. 306; *In re Swift*, 137 N. Y. 77; *In re Knoedler*, 140 N. Y. 377; *Wallace v. Myers*, 38 Fed. Rep. 184; *State v. Dalrymple*, 70 Md. 294; *Tyson v. State*, 28 Md. 577; *Eyre v. Jacob*, 14 Grat. 422; *Pullen v. County Commissioners*, 66 N. C. 361; Dos Passos on Collateral Inheritance Taxes; Hanson's Probate, Legacy, and Succession Duties.

It is contended that the authority given in our Constitution to the General Court is not to levy duties and excises generally, but only to levy duties and excises "upon any produce, goods, wares, merchandise, and commodities whatsoever, brought into, produced, manufactured, or being within the" Commonwealth. The excises to which the inhabitants of the Province of Massachusetts Bay were accustomed were taxes in the nature of license fees for carrying on certain kinds of business, taxes on the sale of goods, wares, and merchandise, such as intoxicating liquors, tea, coffee, and chocolate, china ware, etc., and stamp taxes on legal papers. The words "produce, goods, wares, merchandise . . . brought into, produced, manufactured, or being" within the Commonwealth, are words of definite meaning, but the words "and commodities whatsoever" are of less certain signification. In the general sense a commodity is something of convenience, advantage, benefit, or profit, and in a special sense a commodity is something produced for use, and an article of trade or commerce. It has been decided that the word "commodities" in our Constitution is not used in this special sense, and that it means more than "produce, goods, wares, merchandise." In *Portland Bank v. Apthorp*, 12 Mass. 252, 256, the court say: "The term 'excise' is of very general signification, meaning tribute, custom, tax, tollage, or assessment. It is limited, in our Constitution, as to its operation, to produce, goods, wares, merchandise, and commodities. This last word will perhaps embrace everything which may be a subject of taxation, and has been applied by our Legislature, from the earliest practice under the Constitution, to the privilege of using particular branches of

business or employment, as the business of an auctioneer, of an attorney, of a tavern keeper, of a retailer of spirituous liquors, etc. It must have been under this general term 'commodity,' which signifies convenience, privilege, profit, and gains, as well as goods and wares, which are only its vulgar signification, that the Legislature assumed the right, which has been uniformly, and without complaint, exercised for thirty years, of exacting a sum of money from attorneys and barristers at law, vendue masters, tavern keepers, and retailers. For every man has a natural right to exercise either of these employments free of tribute, as much as a husbandman or mechanic has to use his particular calling. The money required of them is not a proportional tax, nor is it an excise or duty upon produce, goods, wares, or merchandise. It is a commodity, convenience, or privilege, which the Legislature has, by contemporaneous construction of the Constitution, assumed a right to sell at a reasonable price; and, by parity of reason, it may impose the same conditions upon every other employment or handicraft." It was held in that case that the statute laying a tax on the stock of a banking corporation was an excise on the franchise or employment, and as such was constitutional. Since that decision the Legislature has often imposed excises upon the franchises of corporations. See *Commonwealth v. People's Five Cents Savings Bank*, 5 Allen, 428; *Commonwealth v. Lowell Gas Light Co.* 12 Allen, 75; *Commonwealth v. Hamilton Manuf. Co.* 12 Allen, 298; *Commonwealth v. Provident Institution for Savings*, 12 Allen, 312; *Manufacturers' Ins. Co. v. Loud*, 99 Mass. 146; *Attorney General v. Bay State Mining Co.* 99 Mass. 148; *Commonwealth v. Lancaster Savings Bank*, 123 Mass. 493; *Commonwealth v. Barnstable Savings Bank*, 126 Mass. 526; *Connecticut Ins. Co. v. Commonwealth*, 133 Mass. 161.

In *Attorney General v. Bay State Mining Co.*, *ubi supra*, the court say: "It is not merely the creation of corporate functions and privileges, or the conferring of rights and franchises by the Legislature, which entitles the State to tax the possessor of such privileges and rights. The exercise of powers or privileges, and even of occupations without especial powers or privileges, may be equally subjected to such taxation, under the constitutional authority to 'impose and levy reasonable

duties and excises.' It was so considered in the case of *Portland Bank v. Apthorp*, 12 Mass. 252; and the tax of one per cent, laid upon the capital stock of the bank, was justified upon principles equally applicable to individuals transacting similar business, and to brokers, factors, auctioneers, etc."

In *Commonwealth v. Lancaster Savings Bank*, *ubi supra*, the court say: "A duty or excise may thus be exacted not merely upon certain articles produced or brought into the State, but also upon any commodities whatsoever. 'Commodity' is a general term, and includes the privilege and convenience of transacting a particular business; and, upon persons carrying on such business, it has never been questioned that the Legislature may levy an excise, or provide that a license must be obtained in order to transact it."

In *Gleason v. McKay*, 134 Mass. 419, it was decided that St. 1878, c. 275, was unconstitutional. That statute attempted to apply St. 1865, c. 283, "to companies, copartnerships, and other associations having a location or place of business within this Commonwealth, in which the beneficial interest is held in shares which are assignable without consent of the other associates specifically authorizing such transfer." The St. 1865, c. 283, imposed an excise tax upon the franchise of certain corporations. It was held that the tax intended to be imposed by St. 1878, c. 275, was not in the nature of a license fee, but of an excise upon a franchise or privilege, and that the defendant enjoyed no franchises or privileges conferred upon it by the Legislature. The defendant was a partnership, the peculiar feature of which was that by agreement between the partners the interest of each might be transferred in much the same manner as stock in an incorporated company. This peculiar feature was held not to be a commodity within the meaning of the Constitution. It is to be noticed that the tax intended to be imposed was not upon a business or employment. The statute in terms applied only to certain kinds of partnership, leaving other partnerships and persons doing the same kinds of business untaxed, and the partnerships taxed possessed no especial privileges derived from the Legislature. In *Portland Bank v. Apthorp* it was said of excises: "Taxes of this sort must undoubtedly be equal; that is, they must operate upon all persons

who exercise the employment which is so taxed." As the tax considered in *Gleason v. McKay* was not upon a business or employment, and as there was no franchise or privilege conferred by the Legislature, the distinction between partnerships with transferable shares and those without rendered the tax unequal and unreasonable, because it was a discrimination founded upon an immaterial fact. See *Oliver v. Washington Mills*, 11 Allen, 268.

When the Constitution of Massachusetts was adopted, Massachusetts was in many respects an independent State, and the Legislature could lay duties and imposts on imported goods, wares, and merchandise as well as excises on domestic goods, wares, merchandise, and commodities, and taxes and assessments upon the persons and estates of the inhabitants. The Constitution of the United States took from the States the right to lay "imposts or duties on imports or exports," but it did not affect the other powers of taxation possessed by the States unless they interfered with the powers granted to the United States. The language of the Constitution of Massachusetts is general, and may well be held to authorize the laying of excises upon all such gainful employments and privileges as are created or may be regulated by law, and commonly have been considered legitimate subjects of taxation in other States and countries. We are of opinion that the privilege of transmitting or receiving by will or descent property on the death of the owner, is a commodity within the meaning of this word in the Constitution, and that an excise may be laid upon it. Although St. 1891, c. 425, in form imposes a tax upon the property which passes in the manner described in the first section, yet the tax plainly is not meant to be a substitute for the annual tax upon estates, or to be an additional tax of that nature; the statute can only take effect by regarding the tax as an excise, and the statute should be so construed as to take effect, if such a construction reasonably can be given to it. We see no difficulty in doing this, and are of opinion that the statute was intended to impose a tax in the nature of an excise.

The only other condition expressed in the Constitution is that duties and excises must be reasonable. In *Connecticut Ins. Co. v. Commonwealth*, 133 Mass. 161, 163, the court say: "The

power to determine what callings, franchises, or privileges, or, to use the language of the Constitution, 'commodities,' shall be subjected to an excise, and the amount of such excise belongs exclusively to the Legislature. The provision that it must be 'reasonable' was not designed to give to the judicial department the right to revise the decisions of the Legislature as to the policy and expediency of an excise. Great latitude of discretion is given to the Legislature in determining, not only what 'commodity' shall be subjected to excise, but also the amount of the excise and the standard or measure to be adopted as the foundation of the proposed excise. The court cannot declare a tax or excise illegal and void, as being unreasonable, unless it is unequal, or plainly and grossly oppressive, and contrary to common right."

The tax imposed by the statute we are considering is said to be unequal, because it is not imposed upon all estates and upon all heirs, devisees, legatees, and distributees. To make a distinction between collateral kindred or strangers in blood and kindred in the direct line in reference to the assessment of such a tax, either by exempting the kindred in the direct line or by imposing on collaterals and strangers a higher rate of taxation, has the sanction of nearly all States which have levied taxes of this kind. It has a sanction in reason, for the moral claim of collaterals and strangers is less than that of kindred in the direct line, and the privilege is therefore greater. The tax imposed by this statute is uniformly imposed upon all estates and all persons within the description contained in it, and the tax is not plainly and grossly oppressive in amount.

It is also contended that the tax is unreasonable on account of the exemption contained in the proviso of the first section of the statute, "that no estate shall be subject to the provisions of this act unless the value of the same, after the payment of all debts, shall exceed the sum of ten thousand dollars." In all, or nearly all, systems of taxation there are some exemptions; but the objection here is that estates whose value, after payment of all debts, shall not exceed ten thousand dollars are exempt, without regard to the value of the property received by the devisees, legatees, heirs, or distributees. It is argued that the excise, if upon the privilege of taking property by will or

descent, should be the same whenever the privilege enjoyed is the same in kind and extent, whatever may be the value of the estate, and that the exemptions should relate to the value of the property received by those who have the privilege of receiving it, and not to the value of the estate. But the right or privilege taxed can perhaps be regarded either as the right or privilege of the owner of property to transmit it on his death, by will or descent, to certain persons, or as the right or privilege of these persons to receive the property. The tax too has some of the characteristics of a duty on the administration of the estates of deceased persons. The cost of administering small estates is proportionately greater than that of administering large ones, and this of itself, particularly in intestate estates, operates to diminish the amounts received very much as a tax would. The statutes of the different States and nations which have levied taxes on devises, legacies, and inheritances have usually made exemptions, and these have sometimes related to the value of the estates, and sometimes to the value of the property received by the heirs, devisees, legatees, or distributees. The exemption in the statute under consideration is certainly large as an exemption of estates, but it is peculiarly within the discretion of the Legislature to determine what exemptions should be made in apportioning the burdens of taxation among those who can best bear them, and we are not satisfied that this exemption is so clearly unreasonable as to require us to declare the statute void.

The result is, in the opinion of a majority of the court, that in *Williams v. Bowditch* the judgment rendered for the defendant must be affirmed; and that in *West v. Phillips*, as no other objection has been taken to the decree of the Probate Court, the decree must be affirmed.

In *Minot v. Winthrop* there are several remaining questions. The first article of the will of Mrs. Winthrop is as follows: "First, I leave to my husband, Robert C. Winthrop, the sum of ten thousand dollars, to be given after his decease to his daughter, Elisa C. Winthrop," etc. Elisa C. Winthrop is not a daughter of the testatrix. This is a bequest of the kind contemplated by § 2 of St. 1891, c. 425, which provides that, "when any person bequeaths or devises any property to or for

the use of" certain persons which include a husband, "during life or for a term of years, and the remainder to a collateral heir or to a stranger to the blood, the value of the prior estate shall, within three months after the date of giving bond by the executor, administrator, or trustee, be appraised in the manner hereinafter provided, and deducted from the appraised value of such property, and the remainder shall be subject to a tax of five per centum of its value." The last clause of § 13 of that statute is as follows: "In case of an annuity or life estate the value thereof shall be determined by the so called actuaries' combined experience tables and four per cent compound interest."

The first article of the will in effect puts ten thousand dollars in trust to pay to Robert C. Winthrop the income thereof during his life, and on his death to pay the principal to his daughter. The statute in § 4, we think, contemplates that the tax should be computed and deducted from the principal sum and paid over to the Treasurer of the Commonwealth, "at the expiration of two years from the date" of the executors' bond, or when the legacy is paid, if paid within such two years. The consequence of paying the tax will be that the principal of the fund will be diminished below the sum of ten thousand dollars, and the income from the fund will be proportionately diminished. The legacy to Mr. Winthrop is not taxable under the statute, because he is the husband of the testatrix. The question is whether his loss of income is to be made up to him out of the principal of the fund, or out of the estate generally, or is to be borne by him as a consequence of the tax levied on the legatee of the remainder. There is nothing in the statute which authorizes any burdens to be imposed upon the legatee of the remainder in addition to the tax, and we find no warrant in the statute for taking any part of the principal of the trust fund, or of the estate generally, to make up the loss of the life tenant. There is no provision in the will for making good this loss out of the estate. We think that Mr. Winthrop must bear the loss. Perhaps a simpler way than that prescribed by the statute would have been to levy the tax at the end of the life estate upon the whole of the fund to be paid to the legatee in remainder, but the plan adopted is, we think, within the power of the Legislature, and Mr. Winthrop must be held to take his life interest subject to the law. While legacies to a husband

are exempt from the tax, the consequences to a tenant for life of imposing a tax upon a legatee in remainder and deducting it from the legacy must be held to have been intended, and no way of reimbursement to the tenant for life has been provided.

By the sixth article of the will, an annuity of five hundred dollars is to be given to the cousin of the testatrix, Mrs. Julia C. Irving. The statute contemplates, we think, that the tax should be paid out of the annuity as soon as the annuity becomes payable, and at the time when payments on account of the annuity are made. See §§ 1, 17. The effect of this construction may be that the first payment or payments on account of the annuity will be exhausted by the tax. Other methods of collecting the tax might have been adopted, such as collecting the tax on each payment and deducting it from such payment, and then the tax would be collected proportionately to the amounts paid so long as the annuity was payable, but the method found in the statute is one, we think, which the Legislature could adopt.

By the thirteenth article of the will the testatrix gave to the Congregational Church and to the St. John's Episcopal Church in Canandaigua in the State of New York one thousand dollars each. It is said in argument that the property of these religious societies is exempt from taxation by the statutes of the State of New York. See N. Y. St. 1890, c. 553, § 1. The contention of the Attorney General is that the exemption of "charitable, educational, or religious societies or institutions, the property of which is exempt by law from taxation," found in the first section of St. 1891, c. 425, is confined to societies the property of which is exempt from taxation by the laws of this Commonwealth. We think that this is the true construction. See *In re Prime*, 136 N. Y. 347; *Catlin v. Trustees of Trinity College*, 118 N. Y. 133; *Healy v. Reed*, 153 Mass. 197.

No objection has been made by any one to the clause of the decree of the Probate Court which declares that "no tax is now payable in respect of the legacies given to Antoinette Granger, Isaphine P. Granger, John Winthrop, Robert C. Winthrop, Jr., and Isabella C. Winthrop." *

* The testatrix gave the income of all her personal estate remaining after a compliance with the preceding provisions of her will to her husband for

In the opinion of the majority of the court, the clause in the decree of the Probate Court in *Minot v. Winthrop* requiring the loss of the income of Robert C. Winthrop to be made good to him out of the fund of ten thousand dollars must be reversed and stricken from the decree, and the remainder of the decree must be affirmed.

Ordered accordingly.

LATHROP, J. I am unable to concur in the opinion of the majority of the court. It proceeds upon the grounds that "the privilege of transmitting and receiving by will or descent property on the death of the owner is a commodity, within the meaning of this word in the Constitution," and that the tax imposed is a reasonable one. I differ with my brethren on both grounds.

The meaning of the word "commodity" was first defined in *Portland Bank v. Apthorp*, 12 Mass. 252, as meaning "privilege, profit, and gains." The tax in that case, which was upon the stock of banking corporations, was held to be constitutional on the historical ground that the Legislature had exercised the right for thirty years of exacting a sum of money, in the nature of a license, from those carrying on certain employments; that this was a contemporaneous construction of the Constitution, and was therefore justified; and that the same principle applied

life; and directed her executors to dispose of the remainder of her property, after the decease of her husband, and pay each legacy in full in preference over every succeeding legacy in the order written: to Antoinette P. Granger and Isaphine P. Granger, nieces, "the sum of ninety thousand dollars in equal shares," and to Robert C. Winthrop, Jr., John Winthrop, and Isabella C. Winthrop the sum of one thousand dollars each. The petition alleged: "The present value of the residue of personal estate available for the payment of said legacies is about one hundred thousand dollars. . . . It is possible that, when said legacies become payable, the estate remaining will be insufficient for their payment. Said legacies are subject to taxation under said act. But there is no property out of which the tax can be paid except the residue of personal property of which said Robert C. Winthrop is entitled to the income for life, and your petitioners are in doubt, and pray to be instructed how the taxes upon the legacies of Elisa C. Winthrop, Antoinette P. Granger, Isaphine P. Granger, Robert C. Winthrop, Jr., John Winthrop, and Isabella C. Winthrop, are to be calculated and paid, what effect, if any, is to be given to the possibility that the estate may be insufficient for the full payment of the legacies, and how the taxes can be paid before the legacies themselves are payable, without impairing the income to which the said Robert C. Winthrop is entitled."

to corporations as to individuals. In other words, the word "commodity" was held to mean the privilege of carrying on business, because the Legislature both before and soon after the framing of the Constitution had levied an excise tax on certain classes of business.

In all the subsequent cases where an excise tax has been held to be constitutional, the decision has been put upon the ground that the tax was upon the franchise of the corporation, namely, upon its privilege of doing business. *Commonwealth v. People's Five Cents Savings Bank*, 5 Allen, 428. *Commonwealth v. Lowell Gas Light Co.* 12 Allen, 75. *Commonwealth v. Hamilton Manuf. Co.* 12 Allen, 298. *Commonwealth v. Provident Institution for Savings*, 12 Allen, 312. *Manufacturers' Ins. Co. v. Loud*, 99 Mass. 146. *Attorney General v. Bay State Mining Co.* 99 Mass. 148. *Commonwealth v. Lancaster Savings Bank*, 123 Mass. 493. *Commonwealth v. Barnstable Savings Bank*, 126 Mass. 526. *Connecticut Ins. Co. v. Commonwealth*, 133 Mass. 161.

In *Commonwealth v. Lancaster Savings Bank*, 123 Mass. 493, by the terms of the statute a tax was to be assessed on the first day of May on the average amount of deposits for the six months preceding that day. In the preceding December the bank was restrained by an injunction from doing further business, and placed in the hands of receivers. The corporation was not dissolved by these proceedings, and it was contended that it was liable to pay the tax. It was, however, held that the tax was a franchise tax upon the privilege of doing business, and that, as the bank was not doing business on the first day of May, it was not liable.

It will be noticed in the case last cited that the tax was on the average amount of deposits during the six months prior to a certain day. During some of these months it had received deposits, but, as it was not doing business on the day named, it was held not to be liable to the tax.

In *Gleason v. McKay*, 134 Mass. 419, the Legislature sought to impose an excise tax upon copartnerships "in which the beneficial interest is held in shares which are assignable without consent of the other associates specifically authorizing such transfer." The statute was held to be unconstitutional. Morton, C. J. said: "This imposition is clearly not in the nature of a license fee, but is an excise upon a franchise or privilege. The

right to levy excises upon franchises has never been extended further than to corporate franchises specially granted by the government, or enjoyed and exercised by its permission. . . . If this tax can be upheld, it seems to us that the necessary result will be that the Legislature has the power to select any business, occupation or calling carried on, or any natural right enjoyed, under the protection of our laws, and impose upon it at its will a special tax or excise. This would be extending the meaning of the word 'commodities' beyond any reasonable limits. Its effect would be to break down the limitations which the Constitution intended to impose upon the power of the Legislature, for the purpose of securing the end that all sums necessary for the defence and support of the government should as far as practicable be raised by the equal taxation of the people."

The case last cited seems to me not distinguishable from the case at bar. I am also unable to see, if the privilege of transmitting and receiving by will or descent property on the death of the owner is to be considered a commodity, why the privilege of holding property cannot be considered a commodity, and why all taxes cannot be levied as excise taxes, and the burden of supporting the government be imposed upon one class in the community, without regard to proportion or equality, and thus the intent of the Constitution be entirely disregarded.

I fail also to see how the tax sought to be levied by the statute before us, if it is an excise tax, can be regarded as "reasonable." This word has always been held to include among its requirements equality. Thus in *Portland Bank v. Apthorp*, 12 Mass. 252, 258, it was said by Parker, C. J.: "Taxes of this sort must undoubtedly be equal; that is, they must operate upon all persons who exercise the employment which is so taxed. A tax upon one particular moneyed capital would unquestionably be contrary to the principles of justice, and could not be supported." See also *Oliver v. Washington Mills*, 11 Allen, 268, 280; *Connecticut Ins. Co. v. Commonwealth*, 133 Mass. 161.

So far as I am aware, no excise tax heretofore passed in this Commonwealth has contained any exemptions. Assuming that reasonable exemptions may be allowed, it seems to me that the Legislature in the statute now before us has so far exceeded its powers that the exemptions should be considered so unreason-

able, and to work so great an inequality that the act should be pronounced unconstitutional.

Without dwelling upon the exemption of direct heirs, and of charitable, educational, or religious societies, which appears to me reasonable, if any exemptions are to be allowed, it seems to me that the proviso at the end of the first section is entirely unreasonable. This provides "that no estate shall be subject to the provisions of this act unless the value of the same, after the payment of all debts, shall exceed the sum of ten thousand dollars." The effect of this is to throw a burdensome tax of five per cent, equal to a year's income, upon a class of estates small in comparison with the large number of estates yearly administered upon in this Commonwealth.

In other States of this country, whose constitutions allow an excise tax of this nature, there is no exemption in some, while in others the exemptions run from \$250 to \$500, and in none does it exceed \$1,000. See Dos Passos on Collateral Inheritance Taxes, 45 *et seq.*

There is also another objection to which I see no answer. If this tax is to be considered constitutional on the ground that it is a tax upon the privilege of taking by devise or succession, there is clearly on the face of the act no equality. Suppose A. and B. die seised of separate estates, the respective values of which, after payment of debts, are ten and over ten thousand dollars. A. bequeaths a legacy to C. of five thousand dollars, and B. bequeaths a legacy to D. of the same amount. C. and D. each enjoy the same privilege; yet C. pays no tax, while D. pays a tax of \$250. Can this be said to be equal, or even reasonable? The necessary effect of the tax is to produce inequality; and, in my judgment, it is as much the duty of the court to declare the statute to be in violation of the Constitution as if it imposed a tax upon property and were disproportionate, as was done in *Cheshire v. County Commissioners*, 118 Mass. 386.

MINA HUPFER vs. JACOB S. ROSENFELD.

Berkshire. September 11, 1894. — October 17, 1894.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

Slander — Burden of Proof — Privilege — Questions for Jury — Good Faith and Actual Malice.

At the trial of an action for slander it appeared that the defendant, whose goods had been stolen and who was trying to find the thief, made charges against the plaintiff in the presence and hearing of two other witnesses. *Held*, that the case could not be withdrawn from the jury on the ground that the words were privileged by the occasion. *Held, also*, that the plaintiff was entitled to go to the jury upon the questions of the defendant's good faith in making the charges, and of his actual malice.

TORT, for slander and for an assault and battery. No question arose under the count for assault and battery. The count for slander alleged that "the defendant, on or about February 16, 1893, publicly, falsely, and maliciously accused the plaintiff of the crime of larceny by words spoken to, of, and concerning the plaintiff substantially as follows: 'You (meaning plaintiff) were the last one in my (meaning the defendant's) store, you (meaning the plaintiff) have stolen my (meaning the defendant's) coat, and you (meaning the plaintiff) must have it'; 'You (meaning the plaintiff) have stolen my (meaning the defendant's) coat, you (meaning the plaintiff) must have it'; 'I (meaning the defendant) wish you (meaning the plaintiff) had not come into my (meaning the defendant's) store, for then I would still have my (meaning the defendant's) coat'; 'You (meaning the plaintiff) must have the coat, you (meaning the plaintiff) have stolen the coat'; 'You (meaning the plaintiff) have stolen the coat; you (meaning the plaintiff) must have it.'"

At the trial in the Superior Court, before *Richardson, J.*, the defendant requested the judge to dismiss the action, as the plaintiff had failed to sustain the burden of proof. The judge ruled that there was evidence for the consideration of the jury, and that it was for them to determine whether the plaintiff had sustained the burden of proof, and instructed the jury in a manner not objected to by either party.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

J. J. Nelligan, for the defendant.

E. M. Wood & G. A. Prediger, for the plaintiff, were not called upon.

ALLEN, J. The only question presented by the bill of exceptions is whether the court should have ruled, as matter of law, that the plaintiff had failed to sustain the burden of proof as to the count for slander; and it is very clear that the court was right in refusing so to rule. Two witnesses besides the plaintiff herself testified to the speaking of the defamatory words in their presence and hearing. The defendant now contends that the words were privileged by the occasion. The case, however, could not be withdrawn from the jury on this ground. If the defendant's goods had been stolen, and if he was trying to find the thief, the plaintiff was nevertheless entitled to go to the jury upon the question of his good faith in making the charge against her, and also upon the question of his actual malice. *Swan v. Tappan*, 5 Cush. 104. *Brow v. Hathaway*, 13 Allen, 239. *Dale v. Harris*, 109 Mass. 193. *Billings v. Fairbanks*, 139 Mass. 66.
Exceptions overruled.



CAROLINE M. HUBBARD, executrix, vs. BOSTON AND ALBANY RAILROAD COMPANY.

Berkshire. September 11, 1894. — October 17, 1894.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

Railroad Accident — Grade Crossing — Precautions other than Statutory — Gate or Flagman — Due Care — Negligence.

If, at the trial of an action for damages for the loss of life of the plaintiff's testator by being struck by the defendant's train at the crossing of a highway by the defendant's railroad, it appears that there were circumstances from which the jury might have found that the testator was negligent in not waiting longer before starting after a freight train had passed, so that he could more effectually use his ears in a place where his eyes could not avail him, and that, on the other hand, there was much to excuse, if not justify, his conduct, the court cannot say, as matter of law, that he was negligent, but it is for the jury to determine whether he was in the exercise of reasonable care.

In order to find negligence on the part of a railroad corporation in not taking other precautions at crossings than sounding the whistle and ringing the bell, as required by statute, to warn travellers of the approach of trains, there must be evidence beyond the fact that there is a public way crossed by a railroad at grade; and where, in an action for damages for the loss of life of the plaintiff's testator by being struck by the defendant's train at the crossing, the bill of exceptions disclosed nothing in regard to the amount of travel on the highway, which, on account of the location of the crossing and its surroundings, was the question which would determine whether extra precautions were necessary or not, and it appeared that the crossing was within a few feet of the railroad station, and the jury, in the view which they took, had an opportunity of judging from the appearance of the road and of the adjacent country how much the road was travelled, it cannot be said, as matter of law, that they erred in finding a gate or flagman necessary.

TORT, by the executrix of the will of William L. Hubbard, for causing his death at a crossing at grade in Richmond by the railroad tracks of the defendant. At the trial in the Superior Court, before *Richardson, J.*, the defendant at the close of the evidence requested the judge to direct a verdict for the defendant. The judge declined so to do, and submitted the case to the jury upon the issue whether or not the defendant was guilty of negligence in not having at the crossing a flagman, gate, or some other method to warn travellers of danger, and upon the issue whether or not the deceased was in the exercise of due care.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The material facts appear in the opinion. The case was formerly reported 159 Mass. 320.

M. Wilcox, (*C. E. Hibbard* with him,) for the defendant.

J. F. Noxon, for the plaintiff.

KNOWLTON, J. This bill of exceptions presents two questions: first, whether there was evidence that the plaintiff's testator was in the exercise of due care; secondly, whether there was evidence of negligence on the part of the defendant in failing to provide a gate or a flagman at the crossing to warn travellers of the approach of trains.

The place where the accident happened was exceedingly dangerous. The railroad at that point runs nearly northeast and southwest, and the plaintiff's testator was driving northerly on the highway which crosses the railroad at an angle of forty degrees. On the westerly side of the highway, extending up to within nine feet of the southerly track, is a ledge of rocks such as to make it impossible for a traveller going northward on the

highway to see a train approaching from the west until he gets almost to the crossing. The testimony shows that a person standing in the highway twenty feet south of the south rail, looking westerly across the north end of the ledge of rocks, could see one hundred and fifty-nine feet of the track next west of the crossing, and one standing fifteen feet south of the south rail could see three hundred and fifty feet of the track next west of the crossing. From that point to a point more than one hundred feet south of the southerly track, and for the greater part of the way to a point three hundred feet southward, no part of the tracks to the westward could be seen. A long freight train was passing over the crossing to the westward on the northerly track, and the plaintiff's testator, who was driving in a lumber wagon, stopped his horse about one hundred feet southward of the southerly track and waited for it to go by. Soon after the last car had gone over the crossing, he started at a slow trot to go across. He was standing in his wagon looking to the westward, but on account of the obstructions it was impossible for him to see the train approaching from that direction. The intervening ledge may have somewhat interfered with the passage of sound of the coming train, and there was doubtless noise from the receding freight cars; so that, while the evidence tends to show that he both looked and listened, he was evidently unaware of the approach of the express train from the west until his horse was on or very near the track. The jury might well have found that he was negligent in not waiting longer before starting after the freight train went by, so that he could more effectually use his ears in a place where his eyes could not avail him. On the other hand, there is much to excuse, if not to justify, his conduct. Very likely it was his first experience of the passage of a long train before him when he was about to cross a railroad. He may have supposed that he would hear the coming train if it was near. Waiting longer in that place would not have enabled him to see whether a train was coming. To have stopped near enough to the track to be able to see along it for any considerable distance would have brought his horse so near as to expose him to great danger from the fright of the horse if a train should chance to come. Under the circumstances of this case we cannot say, as matter of law, that he was negligent, but

we are of opinion that it was for the jury to determine whether he was in the exercise of reasonable care.

While the case of *Fletcher v. Fitchburg Railroad*, 149 Mass. 127, resembles this in some particulars, in others it materially differs from it. There the plaintiff drove upon the track without excuse when his view of the adjacent track, on which he had reason to expect a passenger train at that hour, was cut off by the intervening cars of a receding freight train, which would have left him an unobstructed view before reaching the place of danger if he had waited half a minute for it to get away.

The jury were permitted to find that the defendant was negligent in not taking other precautions than sounding the whistle and ringing the bell to warn travellers of the approach of trains. It is well settled in this Commonwealth that the requirements of the Pub. Sts. c. 112, §§ 163, 164, in regard to the erection of signboards and the sounding of the whistle and the ringing of the bell of locomotive engines at crossings, are not exclusive of other provisions for the protection of the public where these are not sufficient to provide reasonably for their safety, and that it is the duty of a railroad corporation to erect gates or station a flagman at a crossing if the security of the public reasonably requires it, even though no request in regard to it has been made by the mayor and aldermen or selectmen, and no order by the county commissioners under the provision of Pub. Sts. c. 112, § 166. *Eaton v. Fitchburg Railroad*, 129 Mass. 364, and cases cited. A similar rule of law prevails in other States. *Richardson v. New York Central Railroad*, 45 N. Y. 846. *Pennsylvania Railroad v. Matthews*, 7 Vroom, 581. *Chicago & Eastern Illinois Railroad v. Boggs*, 101 Ind. 522.

Ordinarily, it is a question of fact for the jury to determine in each particular case whether the warnings imperatively required by the statute to protect the public at railroad crossings are sufficient for that purpose, or whether additional precautions for their safety are necessary. But in order to authorize a jury to find negligence in not taking such additional precautions, there must be evidence beyond the mere fact that there is a public way crossed by a railroad at grade. There must be something in the configuration of the land, or in the construction of the railroad, or in the structures in the vicinity, or in the nature

or amount of the travel on the highway, or in other conditions, which renders ringing the bell and sounding the whistle inadequate properly to warn the public of danger. Evidence that daily twenty trains on a road and about as many vehicles on a highway passed over a place where the railroad crossed the highway at grade, but was in full view of the highway at any point within one hundred and fifty feet of the crossing, and where the public authorities never required the establishment of a gate or flagman, has been held to be insufficient to warrant a finding that the railroad corporation was guilty of negligence in omitting to provide there such a safeguard. *Commonwealth v. Boston & Worcester Railroad*, 101 Mass. 201.

The crossing in the present case for persons travelling northward on the highway was very dangerous. For a considerable distance before reaching the crossing one would be obliged to depend wholly on his sense of hearing to discover whether a train was approaching. There are very few horses that can safely be stopped within fifteen or twenty feet of a railroad track to await the passage of an express train. One driving there before the accident was obliged to choose between the risk of driving across and being struck by an express train whose approach he might fail to hear, and the risk of stopping to look so near the track as to expose him to great danger from the fright of his horse if an approaching train should be near. If this highway was a great thoroughfare we think it clear that other precautions were needed. On the other hand, if there was but little travel over it, ringing the bell and sounding the whistle may have been all that was reasonably necessary. The bill of exceptions discloses nothing in regard to the amount of travel on the road, but it appears that the crossing was within a few feet of the railroad station in Richmond, and the jury, in the view which they took, had opportunities of judging from the appearance of the road and of the adjacent country how much the road was travelled. We cannot say, as matter of law, that they erred in finding a gate or flagman to be necessary.

If it is deemed best that railroad corporations shall be free from obligation to maintain a gate or to station a flagman at any crossing unless ordered or requested so to do by the public authorities under the statutes, it will be easy for the Legislature to pass a law to that effect.

Exceptions overruled.

CAMILLE L'HERBETTE vs. PITTSFIELD NATIONAL BANK.

Berkshire. September 11, 12, 1894. — October 17, 1894.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

National Bank — Principal and Agent — Evidence.

If the cashier of a national bank, assuming to act in its behalf, receives at the bank money left with him as and for a deposit in the bank, the fact that, at the time of receiving it, he agrees that the bank shall at some time in the future invest the money in stocks and bonds for the depositor, and meanwhile shall allow him interest upon it, does not have the effect to exonerate the bank from its liability to refund the money without interest to the depositor on demand, no investment thereof having been made, even if such agreement by the cashier was invalid, and the money did not actually come to the use of the bank, but was misappropriated by the cashier.

At the trial of an action against a national bank for money deposited at the bank with its cashier, upon the agreement that the money should be invested by the bank in stocks and bonds, no exception lies to an instruction to the jury that, "if the directors" of the bank, "through inattention or otherwise, suffered the cashier to pursue and practise a certain line of conduct for a considerable period of time without objection, the bank will be bound by his acts within that line of conduct."

In an action against a national bank for money deposited at the bank with its cashier, it appeared that the money was sent by the plaintiff to the bank at different times, with slips or tickets in substance like ordinary slips or tickets accompanying deposits; that the money was withdrawn on orders addressed to the bank, resembling ordinary checks; and that the sums so paid in and so withdrawn were entered by the cashier on an envelope, and the entry in one instance was verified by his initials, thus: "E. S. F., Cas." *Held*, that the envelope was admissible in evidence.

In an action against a national bank for money deposited at the bank with its cashier, upon the agreement that the money should be invested by the bank in stocks and bonds, if the issue is whether the plaintiff dealt with the cashier as an individual or as the representative of the bank, evidence of former transactions similar in kind are competent.

Although a witness, whose deposition is taken out of the Commonwealth, annexes copies instead of the originals of papers to the deposition, the court in its discretion may allow them to be read.

In an action against a national bank for money deposited at the bank with its cashier, upon the agreement that the money should be invested by the bank in stocks and bonds, the issue being whether the plaintiff dealt with the cashier as an individual or as the representative of the bank, a broker testified that his firm bought certain shares of stock for the defendant bank, taking the certificate in the plaintiff's name, and that his firm had had another account with the bank for several years. *Held*, that a receipt for shares of said stock in the plaintiff's name from the witness's firm signed by the defendant's cashier as such, previously to the transaction in suit, was admissible in evidence.

In an action against a national bank for money deposited at the bank with its cashier, upon the agreement that the money should be invested by the bank in stocks and bonds, the issue being whether the plaintiff dealt with the cashier as an individual or as the representative of the bank, a witness, who was the bookkeeper of the bank, testified that the bank had accounts with brokers in two cities named who bought and sold stocks for its customers if ordered through the bank; and that these brokers, on occasions prior to the transaction in suit, had bought for the bank certain shares of stock for which certificates were by its direction, as shown by other evidence, taken in the plaintiff's name. *Held*, that the testimony was competent.

Evidence to show that a bank did not enter on its books a person's name as a depositor is incompetent, in an action by such person against the bank for money deposited at the bank with its cashier, upon the issue whether the plaintiff dealt with the cashier as an individual or as the representative of the bank, the cashier agreeing that the money should be invested by the bank in stocks and bonds.

An exception cannot be sustained to the exclusion of evidence which is contended to have been competent as tending to show a fact which has been found by the jury in favor of the excepting party.

In an action against a national bank for money deposited at the bank with its cashier, upon the agreement that the money should be invested by the bank in stocks and bonds, the issue being whether the plaintiff dealt with the cashier as an individual or as the representative of the bank, the question to a witness who had been a bookkeeper for the bank, "whether or not to his knowledge the plaintiff had any account with the bank" in certain years named, is rightly excluded, there being no suggestion that the witness knew anything about the transactions with the cashier.

CONTRACT, upon an account annexed, for money deposited by the plaintiff with the defendant. At the trial in the Superior Court, before *Maynard*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

J. C. Crosby, (*J. F. Noxon* with him,) for the defendant.

T. P. Pingree & C. E. Burke, for the plaintiff.

ALLEN, J. At the trial, the issue was clearly defined whether the money was paid to Francis, the defendant's cashier, in his individual capacity, to be used by him individually for the plaintiff, or whether it was paid to him as cashier of the bank, and as and for a deposit in the bank. According to the findings of the jury, the plaintiff deposited his money with Francis, acting as cashier of the defendant bank, and Francis received the same acting in that capacity, and not in his individual capacity. An agreement was made that the money should draw interest, but there was no usage of the bank authorizing the cashier to allow interest on deposits, and the jury allowed none in their verdict. The defendant bank did not actually receive

the money from the cashier. The deposits were upon the distinct understanding and agreement with Francis as cashier that the same should be invested by the bank in stocks and bonds for the plaintiff.

The scope of the last finding is not clearly defined, but it has not been assumed by counsel on either side that the money was to be invested by the bank at its mere discretion, and without previous directions from or the assent of the plaintiff. The argument for the defendant is that national banks have no authority to deal in stocks or bonds, or to act as brokers or agents for others in the purchase of them; and also that an agreement by the cashier that deposits should draw interest was beyond his authority, and not binding upon the defendant.

Let these positions of the defendant be assumed without discussion to be correct. Assume also that the plaintiff was bound to take notice of the limitation of the power of the bank, and of the authority of the cashier in these respects. It follows certainly that he could not enforce these agreements, but it does not follow that he could not recover back his money without interest, no investment of it having been made for him by the bank or by the cashier.

There is no doubt that the cashier was a proper officer of the bank to receive deposits of money at the bank in its behalf, (Morse on Banking, § 161,) and there was nothing criminal or immoral in either of the agreements made by him. If those agreements were invalid because *ultra vires* or unauthorized, there certainly would be no reason why the bank should not be held to refund to the plaintiff his money on demand, provided the bank had actually received it. The fact of the cashier's making the invalid agreements at the time of receiving the deposits would not entitle the bank to retain the money for its own use, or debar the plaintiff from recovering it back.

Nor does the fact that the money, by reason of the cashier's misappropriation of it, did not actually come to the use of the bank, make any difference. The dealing between the plaintiff and the cashier was at the bank, and it was on the footing that in receiving the money the cashier represented the bank. The money was paid and received as and for money deposited in the bank. Suppose that no agreement as to the future invest-

ment of the money had been made, it could hardly be doubted that the money paid at the bank to the cashier, as and for a deposit in the bank, and accepted by him as such, would be treated as having been received by the bank, even though the cashier should embezzle it. The agreement was that the money should be invested by the bank; not that it should be invested by Francis. The making of this agreement does not impair the obligation which rests upon the bank by reason of the deposit of the money with its cashier. The bank is bound because its cashier, assuming to act in its behalf, received the plaintiff's money as money deposited in the bank; and the fact of his making invalid agreements, if his agreements were invalid, that the bank should at some time in the future invest the money for the plaintiff, and meanwhile should allow him interest upon it, does not have the effect to exonerate the bank from its liability to refund the money without interest to the plaintiff on demand, no investment thereof having been made by it. *White v. Franklin Bank*, 22 Pick. 181. *Atlas Bank v. Nahant Bank*, 3 Met. 581, 585-588. *Dill v. Wareham*, 7 Met. 438. *Morville v. American Tract Society*, 128 Mass. 129, 137, 138. *Davis v. Old Colony Railroad*, 131 Mass. 258, 275. *Logan County National Bank v. Townsend*, 139 U. S. 67, 74. *Spring Co. v. Knowlton*, 103 U. S. 49. *Hitchcock v. Galveston*, 96 U. S. 341, 350. *East River National Bank v. Gove*, 57 N. Y. 597, 601. *Ziegler v. First National Bank of Allentown*, 93 Penn. St. 393. *First National Bank of Monmouth v. Brooks*, 3 Nat. Bank Cas. 387. *Thompson v. Bell*, 10 Exch. 10.

The defendant excepted to the statement by the court that, "If the directors, through inattention or otherwise, suffered the cashier to pursue and practise a certain line of conduct for a considerable period of time without objection, the bank will be bound by his acts within that line of conduct." It is not necessary for us to hold that this would be correct as a universal proposition. The defendant's argument upon it is that the bank would not be bound because of the cashier's agreement as to investing the money; and the only significance of the instruction was that the bank would be bound, if the directors suffered the cashier to receive money from depositors with an agreement that the same should be invested by the bank in stocks and

bonds. The instruction must be considered with reference to the aspect of the case to which it was applicable. So considered, it was right. Beyond this we need not go till the question actually arises.

The defendant also relies on certain exceptions in matters of evidence.

1. As to the envelope. According to the testimony of the plaintiff and his daughter, this was used and delivered to the plaintiff by the cashier as a statement of the plaintiff's account in the bank, in like manner as an ordinary bank-book is generally used and delivered. Money was sent by the plaintiff at different times, with slips or tickets addressed to the defendant bank, in substance like ordinary slips or tickets accompanying deposits; and the money was withdrawn on orders addressed to the defendant bank, resembling ordinary checks. The sums so paid in and so withdrawn were entered by the cashier on this envelope, and the entry in one instance was verified by his initials, thus: "E. S. F., Cas." There was a statement that interest was to be paid at the rate of four per cent, but no minute of the agreement to invest the money in the future. This envelope was competent as the statement by the proper officer of the bank, made at the time of actual transactions, of the sums received and paid out. There can be no doubt that an ordinary bank-book is competent against a bank for the purpose of showing the state of a depositor's account. This envelope was admissible in like manner. *Morse on Banking*, § 103.

2. On the question whether the plaintiff was dealing with Francis as an individual or with him as an officer of the defendant bank, the former transactions were competent, being similar in kind.

3. Although the deponent Parmly, who was out of the State, annexed copies instead of the originals of papers to his deposition, the court in its discretion might allow them to be read. *Binney v. Russell*, 109 Mass. 55. *Williamson v. Cambridge Railroad*, 144 Mass. 148.

4. Exhibit 19* was competent as tending to show that the plaintiff's former dealings were with the defendant bank. Ac-

* Exhibit 19 was as follows: "Pittsf'd, Mass., Aug. 26, 1891. Received of Lee, Higginson, & Co., Certificate No. 25925 for Three —3— Shares

cording to Jackson's testimony, his firm (Lee, Higginson, and Company) bought the shares in question for the defendant bank, taking the certificate in the plaintiff's name; and his firm had had an open account with the defendant bank for several years.

5. The testimony of Willis D. Smith was competent, as tending to show not only that the defendant was in the habit of acting for its customers in the purchase of stocks through brokers in Boston and New York, but also that the former dealings of the plaintiff were with the bank, and that the bank kept on its books accounts with the two firms of brokers who on former occasions had bought for the bank the shares for which certificates were by its direction taken in the plaintiff's name.

6. Testimony to show that the defendant did not enter on its books the plaintiff's name as a depositor had no legitimate tendency to show that the plaintiff's transactions were not with the bank. This would at most be an implied denial by the defendant of its liability, in the absence of the plaintiff, who cannot be affected by its omission to make entries on its books. *Sanborn v. Fireman's Ins. Co.* 16 Gray, 448, 455. *Morse v. Potter*, 4 Gray, 292, 293.

It is now contended that this evidence was competent, as tending to show that the bank never received the benefit of the plaintiff's money. Whether this was so or not, the jury found this fact in favor of the defendant, and no exception can now be sustained on this ground to the exclusion of the evidence.

7. The question to the witness Charles C. Francis, who had been a bookkeeper for the defendant, "whether or not to his

Boston & Albany R. R. Co., In the name of Camille L'Herbette. E. S. Francis, Cas."

Willis D. Smith testified that he was the bookkeeper of the defendant bank in the years 1892 and 1893; that the bank had accounts with brokers in New York and Boston, who bought and sold stocks for its customers if ordered through the bank; that these brokers were Marquand and Parmly in New York, and Lee, Higginson, and Company in Boston; and that the books of account with the brokers showed that, on February 24, 1891, the bank bought five shares, and on August 26, 1891, three shares, of Boston and Albany Railroad stock, through Lee, Higginson, and Company, and on December 24, 1891, bought thirteen shares of "C., B. & Q." stock through Marquand and Parmly. It appeared by the evidence of these brokers that the certificates for these shares of stock were taken, by the bank's directions, in the plaintiff's name.

knowledge the plaintiff had any account with the bank in 1892 or 1893," was rightly excluded. His knowledge was only that which was shown by the books. There was no suggestion that he knew anything about the transactions with the cashier. He was merely a bookkeeper, so far as appears.

The defendant made a general request for a ruling that, on the whole evidence, the plaintiff could not recover. This ruling was rightly refused. The evidence was sufficient to warrant the verdict for the plaintiff.

On an examination of the whole case, the trial appears to have been well conducted, and we find no error in any of the rulings which were excepted to. *Exceptions overruled.*

A. CHALKLEY COLLINS, administrator, *vs.* THEODORE C. WICKWIRE, administrator.

Berkshire. September 12, 1894. — October 17, 1894.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

Devise and Legacy — Life Estate with Power of Disposition — Objection to Auditor's Report.

A devise and bequest to the testator's wife of "all my personal and real estate, to have and to hold for her use and her benefit during her natural life, with the right to dispose of the same by gift or will at her decease," and "should she decease without will or testament, or any actual conveyance to others of the right of said estate at her decease, then the real estate or its value shall be divided as follows, namely," gives the widow merely a life estate with a power of disposition.

An objection to the report of an auditor, that the evidence upon which his conclusion is based was inadmissible, should be taken by a motion to recommit the report to the auditor, and cannot be taken for the first time at the trial as a ground for rejecting the whole report.

CONTRACT, by the administrator *de bonis non*, with the will annexed, of the estate of Norman Kellogg, against the administrator of the estate of Caroline M. Kellogg, for money had and received by the defendant's intestate under the provisions of said will, and not disposed of by her at the time of her decease by gift or will.

Trial in the Superior Court, without a jury, before *Mason*, C. J., who found for the plaintiff; and the defendant alleged exceptions. The material facts appear in the opinion.

E. M. Wood, for the defendant.

A. C. Collins, *pro se*.

KNOWLTON, J. The fundamental question in this case is whether the defendant's intestate, Caroline M. Kellogg, took an absolute estate in fee simple in the property given her in the first clause of the will of her husband, Norman Kellogg, or whether she had only a life estate, with a power of disposition. The language of the material part of the will is as follows: "First, I give and devise to my beloved wife, Caroline Mason, all my personal and real estate, to have and to hold for her use and her benefit during her natural life, with the right to dispose of the same by gift or will at her decease. Second, I direct that should she decease without will or testament, or any actual conveyance to others of the right of said estate at her decease, then the real estate or its value should be divided as follows, namely," etc.

The defendant invokes the well established principle that where a will gives an absolute ownership of property, with full power of disposition, a limitation over is void, because it is inconsistent with the absolute title given to the first devisee. *Ide v. Ide*, 5 Mass. 500. *Burbank v. Whitney*, 24 Pick. 146. *Gifford v. Choate*, 100 Mass. 343. *Perry v. Cross*, 132 Mass. 454. *Kelley v. Meins*, 135 Mass. 231, 235. *Ramsdell v. Ramsdell*, 21 Maine, 288, 293. *Jackson v. Bull*, 10 Johns. 19. *Auburn Theological Seminary v. Kellogg*, 16 N. Y. 83. *Van Horne v. Campbell*, 100 N. Y. 287.

On the other hand, in this State, and generally elsewhere, this principle is held not to be applicable where the will purports to give only a life estate to the first taker, with merely a power of disposition of the remainder as a separate interest. In such a case, if the power is executed, the property passes under the original will through the execution of the power to the person designated, and if it is not executed it remains to be affected by the other provisions of the will, or to pass as undeviseed estate of the testator. *Kuhn v. Webster*, 12 Gray, 3. *Kelley v. Meins*, 135 Mass. 231. *Welsh v. Woodbury*, 144 Mass. 542. *Joslin v.*

Rhoades, 150 Mass. 301. *Chase v. Ladd*, 153 Mass. 126. *Kent v. Morrison*, 153 Mass. 137. *Burleigh v. Clough*, 52 N. H. 267. *Ramsdell v. Ramsdell*, 21 Maine, 288, 293. In a case of this kind it is often difficult to discover the intention of the testator, and the case now before us is by no means clear. The terms of the limitation of the wife's estate, "to have and to hold for her use and her benefit during her natural life," describe an estate which terminates at her death; and the words which follow, "with the right to dispose of the same by gift or will at her decease," are appropriate to create a mere power of appointment or designation, as distinguished from an ownership. There is nothing in any other part of the will which calls for a different construction of this language.

The second clause refers to the "right of said estate at her decease" as an interest or estate by itself, and directs the disposition to be made of it in case the widow should decease without executing her power to dispose of it by will or by gift in her lifetime. Considering all the language together, we are of opinion that the Superior Court rightly ruled that the will gave her merely a life estate with a power of disposition.

The defendant presented at the trial, and afterwards filed, a writing entitled "Defendant's objections to auditor's report," which begins as follows: "The defendant objects to the allowance of the report of the auditor for the following reasons." Then follows a statement of two reasons, both of which rest solely upon the alleged incompetency of evidence admitted at the hearing before the auditor. The auditor's report was introduced, but no motion was at any time made to recommit it, and no requests were made for rulings in regard to the effect to be given to any of the evidence reported, or to any of the statements contained in it. The auditor found for the plaintiff, and the defendant excepted to the refusal to sustain his objections to the report, and to a ruling that the auditor's report was sufficient to support a finding for the plaintiff.

The questions in regard to the admission of evidence by the auditor cannot be raised by the defendant in this way. These objections should have been raised by a motion to recommit the report for amendment before the trial. *Kendall v. May*, 10 Allen, 59. *Fair v. Manhattan Ins. Co.* 112 Mass 320. *Briggs*

v. *Gilman*, 127 Mass. 530. *Eagan v. Luby*, 133 Mass. 543. So far as questions of law were apparent on the face of the report, and were founded on facts or evidence reported by the auditor, the defendant might have asked for rulings in regard to them, and the court might have ruled in regard to the effect to be given to different parts of the report. But, as was said by Chief Justice Gray in *Briggs v. Gilman*, 127 Mass. 530, "An objection to a portion of the evidence upon which the auditor has based his conclusion cannot be taken, as matter of right, except by motion to recommit the report to the auditor before the trial. To allow such an objection to be taken for the first time at the trial, as a ground for rejecting the whole report and proceeding to trial without it, would defeat the purpose of the statute."

Exceptions overruled.

COMMONWEALTH vs. MICHAEL J. KYNE.

Worcester. October 1, 1894. — October 17, 1894.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Intoxicating Liquors — Keeping with Intent unlawfully to sell — Evidence — Meaning of "Intoxicating Liquors" — Discretion of Justice.

At the trial of a complaint for keeping intoxicating liquors with intent unlawfully to sell the same, evidence that a deputy marshal of the United States went to the defendant's house not very long after the time of the alleged illegal keeping, and in reply to a question told him he was wanted for a violation of the United States revenue laws in selling intoxicating liquors without having paid a United States revenue tax, and that the defendant replied that he meant to have paid it and would do so now, and inquired how much the fine would be, and offered to pay it, is competent in connection with other evidence tending to show the defendant's guilt, and the term "intoxicating liquors" must be presumed to have been used by the marshal in its ordinary sense, and to have referred to liquors the sale of which without a license is unlawful.

At the trial of a complaint for keeping intoxicating liquors with intent unlawfully to sell the same, it is within the discretion of the presiding justice to decide that evidence of remarks of the defendant in the nature of an admission was not too remote.

COMPLAINT, dated December 1, 1893, charging the defendant with keeping intoxicating liquors with intent unlawfully to sell

the same. At the trial in the Superior Court, before *Maynard, J.*, the jury returned a verdict of guilty; and the defendant alleged exceptions. The facts appear in the opinion.

E. J. McMahon, for the defendant.

F. A. Gaskill, District Attorney, for the Commonwealth.

KNOWLTON, J. The only exception argued relates to the admission of evidence of what the defendant said about six weeks after the time at which he was charged with keeping intoxicating liquors with intent unlawfully to sell them. A deputy marshal of the United States went to his house, and in reply to a question told him he was wanted for a violation of the United States revenue laws, in selling intoxicating liquors without having paid a United States revenue tax. He replied, "I meant to have paid it, and will do it now." He inquired how much the fine would probably be, and counted out the money and offered to pay it. This was in the nature of an admission that he had been selling intoxicating liquors at some time before. In connection with the other evidence against him it was competent.* Although the time to which the admission related was not definitely fixed, the statement was made not very long after the time of the alleged illegal keeping, and it was within the discretion of the presiding justice to decide that it was not too remote. *Commonwealth v. Finnerty*, 148 Mass. 162. *Commonwealth v. Hurley*, 158 Mass. 159. *Commonwealth v. Neylon*, 159 Mass. 541.

* There was evidence that the defendant, with his wife and family, occupied a flat in a tenement house in Leicester; that, while the officers were searching the premises for liquor on the evening of November 29, 1893, one of them noticed the wife of the defendant in his presence going down the stairs from the tenement carrying something under her apron, which, after resistance on her part, he took from her, and which proved to be a gallon jug full of whiskey; that in a building near the house occupied by the defendant was a saloon in which was a bar or counter; that on July 23, 1893, the officer saw five men go into the saloon, and one man remain outside talking with the defendant; that on September 19, 1893, the officer saw a crowd of men between the house occupied by the defendant and the saloon; that four men were in the saloon and the defendant was outside, and the defendant had the key of the saloon; that the building occupied by the defendant contained two other occupied tenements; and that in the cellar of the building were four compartments, in one of which the officers found nine empty one-gallon jugs and five empty two-gallon jugs.

The term "intoxicating liquors" must be presumed to have been used in its ordinary sense, and to have referred to liquors the sale of which without a license is unlawful.

Exceptions overruled.

NEW ENGLAND TRUST COMPANY vs. SAMUEL A. B. ABBOTT,
executor.

Suffolk. March 14, 1894. — October 18, 1894.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Corporation — Validity of Contract — Public Policy — Appraisal of Stock — Specific Performance — Evidence — Remedy.

The fact that conditions printed upon a certificate for shares of stock in a corporation are contained in by-laws of the corporation which may be invalid as such, does not render void the agreement made in accepting the certificate by the person to whom it is issued, if the contract is in substance one which the corporation has power to make.

A corporation has the power to agree with a purchaser of shares of its stock that, at his death, the shares shall be appraised by the directors of the corporation and transferred to it at the appraised value, if the directors so elect, who, "when-ever, in their judgment, it can be done with safety and advantage to the corporation," shall "sell the shares to such persons as shall appear to them, from their situation and character, most likely to promote confidence in the stability" of the corporation; and such an agreement is not contrary to public policy.

Certificates for shares of stock in a corporation recited that they were subject to the conditions expressed in the by-laws of the corporation printed thereon, which provided that the executor or administrator of any deceased stockholder should cause his shares to be appraised by the directors, and should thereupon offer the same to them for the use of the corporation at such appraised value; that if the directors should not, within ten days after the shares were offered to them, take the same and pay the executor or administrator the appraised value, he might sell the shares to any person; and, by an amendment, that it should be the duty of such executor or administrator to offer the shares for appraisal and to be taken by the corporation, if it should so elect, whenever requested by a certain officer within a time limited. A certificate for shares was issued to A., who receipted for the same as follows: "Received the above certificate subject to the conditions and restrictions therein referred to, and to the by-laws of the company, to which I agree to conform." At a meeting of the directors of the corporation it was voted that the stock of A., who had died, be appraised at a certain sum per share and taken for the use of the corporation. *Held*, upon a bill in equity to compel the executor of A.'s will to transfer the shares to the corporation, that the appraisal was valid; and that it was not necessary that the defendant should offer the stock to the corporation for appraisal.

If the by-laws of a corporation, containing conditions subject to which the certificates for stock are issued, provide that at the death of a stockholder his shares shall be appraised by the directors of the corporation and transferred to it at the appraised value, if the directors so elect, who are to dispose of it in a certain manner, it is no objection to a bill in equity by the corporation against the executor of the will of a deceased stockholder, whose shares it has so appraised and voted to take for the use of the corporation, for specific performance of the agreement to convey the shares made in accepting the certificate, that the stock was undervalued, there being no fraud in the appraisal, and evidence relating to the value of the stock is rightly excluded; and, no stock in the corporation ever having been sold in the market, but all shares which have been transferred having been transferred to the corporation and disposed of by the directors in the manner provided, an action at law for damages will not furnish an adequate remedy.

MORTON, J. This is a bill brought by the plaintiff to compel the transfer to it by the defendant, as executor of the will of Josiah G. Abbott, of certain shares in the plaintiff corporation which were held by said Abbott at his decease, and which it is alleged he agreed, when the certificates were issued to him, should be appraised at his death by the directors, and transferred to the plaintiff at the appraisal, if the directors so elected. The bill also seeks to enjoin the defendant from prosecuting an action at law brought by him against the plaintiff to recover certain dividends upon said shares that have been declared by it.

The plaintiff was organized in 1869 under a special charter, (St. 1869, c. 182,) with a capital of five hundred thousand dollars, which was afterwards increased to a million. The terms of the alleged agreement are found in the by-laws, of which all that is now material is as follows:

"Article 7. Any member of this corporation who shall be desirous of selling any of his shares, the executor or administrator of any member deceased, and the grantee or assignee of any shares sold on execution, shall cause such, their shares respectively, to be appraised by the directors, which it shall be their duty to do on request, and shall thereupon offer the same to them for the use of the corporation at such appraised value; and if said directors shall choose to take such shares for the use of the corporation, such member, executor, administrator, or assignee shall, upon the payment or tender to him of such appraised value thereof, and the dividends due thereon, transfer and assign such share or shares to said corporation; provided,

however, the said directors shall not be obliged to take such shares at the appraised value aforesaid, unless they shall think it for the interests of the company; and if they shall not, within ten days after such shares are offered to them in writing, take the same, and pay such member, executor, administrator, or assignee therefor the price at which the same shall have been appraised, such member, executor, administrator, or assignee shall be at liberty to sell and dispose of the same shares to any person whatever.

"Article 8. The directors shall have power, and it shall be their duty, to sell and dispose of the shares which may be transferred as aforesaid to the corporation, whenever, in their judgment, it can be done with safety and advantage to the corporation; and in all sales made by the directors, under any of the aforesaid provisions, it shall be their duty to sell the shares to such persons as shall appear to them, from their situation and character, most likely to promote confidence in the stability of the institution; no greater number than one hundred shares being assigned to any one person; nor, in the case of a person already a member, a greater number than will be sufficient to increase his previous number to one hundred shares."

These by-laws were adopted before any certificates of stock were issued. Afterwards, but before the capital was increased, Article 7 was duly amended by adding to it the following:

"It shall be the duty of such executor, administrator, grantee, or assignee to offer said shares for appraisal and to be taken by the corporation, if it shall so elect, whenever requested by the actuary or secretary, and no dividends or interest shall be paid or allowed after a failure to comply with such request; provided that such request shall not be made until after the payment of one dividend and the expiration of six months from the death of the owner or sale as aforesaid; but the offer may be made at any earlier period if the party shall prefer."

Every certificate contained on its face, as part of the certificate, the provision that "said shares are transferable only in person, or by attorney duly constituted, on the books of the company, and in the manner and upon the conditions expressed in the by-laws of the company printed upon the back of this certificate." On the backs of the certificates were printed By-laws 7 and 8.

By-law 7 was printed as amended on the backs of those issued after the increase. There were also on the stubs from which the certificates were detached in the certificate-books two receipts given and signed by the defendant's testator at the time the two certificates were issued to him in the original and increased capital, which were each as follows: "Received the above certificate subject to the conditions and restrictions therein referred to, and to the by-laws of the company, to which I agree to conform."

The defendant contends that these by-laws are void. We have not found it necessary to consider that question, and we express no opinion upon it. We think that the case well may stand on the ground that the defendant's testator entered into an agreement with the plaintiff to do what the plaintiff now seeks to compel his executor to do.

It is manifest that a stockholder may make a contract with a corporation to do or not to do certain things in regard to his stock, or to waive certain rights, or to submit to certain restrictions respecting which the stockholders might have no power of compulsion over him. In *Adley v. Whitstable Co.* 17 Ves. 315, 323, Lord Eldon says: "It has been frequently determined, that what may very well be made the subject of contract between the different interests in a partnership would not be good as a by-law; for instance, an agreement among the citizens of London, who have as extensive a power of making by-laws as any corporation, that they would not sell, except in the markets of London, would be good; yet it has been declared by the legislature, that a by-law to that effect is bad." See also *Davis v. Second Universalist Meeting-House*, 8 Met. 321; *Bank of Attica v. Manufacturers & Traders' Bank*, 20 N. Y. 501, 505, 506; *Cook, Stock & Stockholders*, § 408.

In the present case the certificates were issued to the defendant's testator in consideration of the payment by him to the corporation of the amount due for the stock, and of the agreements with it on his part which they contained. By accepting them without objection, and by signing the receipts, he agreed to the conditions printed on the backs of the certificates. The fact that the conditions were contained in by-laws which may have been invalid as such, does not render his agreement void, if the

contract was in substance one which the corporation had power to make.

We think that it had such power. It is held in this State that a corporation unless prohibited may purchase its own stock, (*Dupee v. Boston Water Power Co.* 114 Mass. 37,) and we see nothing opposed to public policy in such an agreement as this with corporations like this. If honestly carried out by the directors it tends to secure a trustworthy body of stockholders, from which those having the care and management of the affairs of the corporation naturally would be selected. It certainly cannot be contrary to public policy that the managers of this and similar institutions should be persons of skill, who possess the confidence of the public, and the restraint upon alienation is no greater than is often agreed to.

In England it is not unusual to find in the deeds of settlement or articles of association under which corporations or joint stock companies have been organized, and which correspond to the charter and by-laws here, provisions requiring the stockholder, in case he wishes to transfer his stock, to offer it to the directors, or to submit to them the name of the transferee for approval. *Bargate v. Shortridge*, 5 H. L. Cas. 297. *Poole v. Middleton*, 29 Beav. 646. *Chappell's case*, L. R. 6 Ch. 902. *Ex parte Penney*, L. R. 8 Ch. 446. *Moffatt v. Farquhar*, 7 Ch. D. 591. No objection seems to have been made to these provisions.

In this State the Legislature in numerous instances has provided in the charters of corporations like this, that the shares shall be transferable according to such rules and regulations as the stockholders shall establish, and not otherwise. It is hardly possible that the Legislature was ignorant of the construction which has been put upon the power thus conferred, and which in the case of the first corporation of the kind chartered in this Commonwealth, the Massachusetts Hospital Life Insurance Company, (St. 1818, c. 180,) was shown, it is said, by the adoption of by-laws from which those in this case were copied. It is true that this charter contains no provision in regard to by-laws, or to the transfer of shares. But the policy of the Legislature cannot be affected by such an omission, in view of the fact that many of the charters since granted contain this provision.

Neither do we think that the agreement is void for the reason

that it authorizes the plaintiff to invest, as the defendant contends, in its own stock, or because it compels the defendant to submit to the appraisal of the directors. If the enumeration in its charter of certain things in which it may invest is to be construed as excluding, among others, its own stock, we think that the object of the agreement is not to secure the transfer of the shares to the plaintiff as an investment, but to enable the directors to dispose of it to "such persons as shall appear to them, from their situation and character, most likely to promote confidence in the stability of the institution." And though, pending its disposition by the directors, it may for convenience' sake be placed with the company's securities, and dividends, if declared, may be collected upon it, that does not alter the essential character of the company's holding. It is settled that one may agree to sell his property at a price to be determined by another, and that he will be bound by the price so fixed, even though the party establishing it was interested, provided the interest was known, and no objection was made by the parties, and no fraud or bad faith is shown. *Brown v. Bellows*, 4 Pick. 179, 189. *Palmer v. Clark*, 106 Mass. 373, 389. *Haley v. Bellamy*, 137 Mass. 357, 359. *Fox v. Hazelton*, 10 Pick. 275. *Strong v. Strong*, 9 Cush. 560, 569. Benjamin on Sales, § 88, note 3.

The defendant objects that there was no real appraisal, and that he did not offer the stock for appraisal. The records of the plaintiff show that, at a directors' meeting at which were present sixteen directors, it was voted that the defendant's stock be appraised at two hundred and twenty dollars per share, and taken for the use of the corporation. The directors were not bound to give the defendant notice or a hearing, (*Palmer v. Clark, ubi supra*,) and we must assume that they gave the matter such attention as, in their opinion, was necessary, and that the appraisal correctly expresses their judgment after taking into account such matters as they thought should be considered. There is nothing to show that they were so mistaken about the facts, that what they did was in no fair sense an appraisal of this stock, but of something else. It is said that they omitted the good will. If so, it was at most an error of judgment, which would not invalidate the appraisal. It was not a condition precedent to the appraisal that the defendant should offer the stock.

The agreement of the defendant's testator was, in substance, that the stock should be appraised by the directors, and that it might be taken at the appraisal by them if they so elected; and that has been done. The offer was for the purpose of fixing a time from which the ten days should begin to run at whose expiration the stockholder could dispose of his stock if the directors did not elect to take it. If the directors appraised the stock and voted to take it at the appraisal, an offer was unnecessary.

Lastly, the defendant contends that the plaintiff is not entitled to specific performance because the stock was greatly undervalued, and because the plaintiff has a remedy at law. It is evident that to remit the plaintiff to an action at law for damages would defeat the very purpose of the contract, and would not, we think, furnish an adequate remedy. No stock in the plaintiff company has ever been sold in the market, and all the shares that have been transferred have been transferred to the plaintiff and disposed of by the directors in the manner provided. About three fourths of the stock of the original subscribers has been thus transferred. There is no evidence that the testator ever objected to this mode of dealing with it. And we see no good reason why the plaintiff should be obliged to accept damages, for which it might be difficult to lay down a clear rule, instead of performance. *Western Railroad v. Babcock*, 6 Met. 346. *Cushman v. Thayer Manuf. Jewelry Co.* 76 N. Y. 365. The case would stand differently, perhaps, if the shares were bought and sold in the market, like most stocks. *Adams v. Messinger*, 147 Mass. 185. The defendant does not charge the directors with any fraud in the appraisal. He expressly disclaims that. It is well settled that where one agrees that another may fix the price for certain property, or the sum to be paid for material or services, the decision of the party selected cannot be impeached by showing that he has committed an error of judgment, or failed to avail himself of all the information which he might have obtained, or has valued the property too high or too low. *Palmer v. Clark*, *ubi supra*. *Flint v. Gibson*, 106 Mass. 391. *Robbins v. Clark*, 129 Mass. 145. *Martinsburg & Potomac Railroad v. March*, 114 U. S. 549. *Stevenson v. Watson*, 4 C. P. D. 148. *Sharpe v. San Paulo Railway*, L. R. 8 Ch. 597. *Richards*

v. *May*, 10 Q. B. D. 400. *Tullis v. Jacson*, [1892] 3 Ch. 441. *Ranger v. Great Western Railway*, 5 H. L. Cas. 72. The evidence that was offered by the defendant relating to the value of the stock was, therefore, rightly excluded.

It is equally well settled that specific performance of an agreement to convey will not be refused merely because the price is inadequate or excessive. The difference must be so great as to lead to a reasonable conclusion of fraud, mistake, or concealment in the nature of fraud, and to render it plainly inequitable and against conscience that the contract should be enforced. *Western Railroad v. Babcock*, 6 Met. 346, 352. *Park v. Johnson*, 4 Allen, 259. *Lee v. Kirby*, 104 Mass. 420. *Chute v. Quincy*, 156 Mass. 189. *Cathcart v. Robinson*, 5 Pet. 264, 271. *Underhill v. Van Cortlandt*, 2 Johns. Ch. 339. *Belchier v. Reynolds*, 2 Kenyon, 87. *Weekes v. Gallard*, 21 L. T. (N. S.) 655. Fry, Spec. Perf. (3d Am. ed.) § 424, note. We are not satisfied that such was the case here. It is to be observed that this is a suit directly between the company and a stockholder, to enforce a contract made with the company by the latter, and that the rights of third parties are not involved. Many of the cases cited and relied upon by the defendant are cases where the rights of third parties are involved, and are therefore inapplicable to this.

The result is, that the plaintiff is entitled to a decree compelling the defendant to convey the shares upon payment by it of the amount of the appraisal with interest, and enjoining him from prosecuting the action at law.

Ordered accordingly.

W. G. Russell & J. L. Stackpole, for the plaintiff.

L. S. Dabney & F. J. Stimson, for the defendant.

STATE TRUST COMPANY vs. OWEN PAPER COMPANY
& others.

Berkshire. September 11, 1894. — October 18, 1894.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

Promissory Note — Indorsement — Variance — Trial — Waiver — Corporation — Finding.

The declaration in an action against A., the maker, and B., the indorser, of a promissory note made to the plaintiff in another State, alleged that B. indorsed the note in blank before delivery. The answer set up that, by the law of the other State, B. did not, by signing the note before delivery, become liable to the payee. The plaintiff filed a replication, stating that, since the action was brought, he had indorsed the note without recourse above the signature of B.; and that, by the law of the other State, he was entitled so to do, and B. was thereby made expressly liable to him upon his indorsement. The note offered in evidence contained on its back the name of the payee, and the words "without recourse" written above B.'s name. *Held*, that there was no variance between the note introduced in evidence and the note described in the pleadings.

In an action upon a promissory note, which was indorsed by the defendant in blank before delivery, if the plaintiff puts in evidence a written waiver by the defendant of demand, protest, and notice, the defendant is not entitled to a ruling, as matter of law, in his favor; and if the defendant does not rest his case on the plaintiff's evidence, but afterwards introduces evidence, he cannot compel the court to rule upon the plaintiff's evidence.

A paper writing, directed to the payee and holder of a promissory note, signed by a person who has indorsed the note in blank before delivery, and stating that he is an indorser and waives demand, protest, and notice, is some evidence, in an action upon the note, that he understood that he was such an indorser as by due demand and notice could be held liable on the note to the payee.

In an action upon a promissory note made in another State, payable to a corporation, and indorsed in blank before delivery, and above which indorsement the name of the payee and the words "without recourse" were written by the secretary of the corporation after the action was begun, if the judge who tries the case without a jury finds that, "in the trial of causes in" the other State, "the indorsement of the payee without recourse may be put on at any time before judgment, or, being merely formal, will be assumed to be made," it is immaterial whether the secretary of the corporation had special authority to make the indorsement.

A promissory note was made payable to a trust company, signed by a corporation, and indorsed in blank before delivery by a man who owned nearly all the stock of the corporation, and by his wife, who was its president, and recited that a certain number of shares of its stock had been pledged to the payee as security "with authority to sell the same on non-performance of this promise in such manner as" the payee, "in their discretion, may deem proper, without notice, . . . and to apply the proceeds thereon"; and authority was also given to the payee to purchase at the sale, if at public auction, and it was agreed that the securities,

or any substitutes therefor or additions thereto, were to be held as collateral, and be applicable to any "other note or claim held against us by said company." In an action upon the note, the judge, who tried the case without a jury, found that the female defendant, who alone defended, "signed her name on the back of the note in suit at her husband's request, and to accommodate him either personally or as treasurer of the " corporation, "and that she intended that her husband should use the note, and intended to give her credit to any one who might loan money on it"; and found for the plaintiff. *Held*, that the plaintiff was entitled to judgment on the finding.

CONTRACT, against the Owen Paper Company, a corporation, Henry D. Cone, and Sarah B. Cone, upon the following instrument:

"\$25,000. New York, Nov. 11th, 1891. On March 11th, 1892, after date, without grace, we promise to pay to the order of the State Trust Company, at the office of said company in the city of New York, twenty-five thousand dollars in gold coin of the United States of the present standard of weight and fineness, or its equivalent, for value received, with interest at the rate of six per cent per annum, having pledged to the said company the under mentioned security (with authority to sell the same on non-performance of this promise, in such manner as they, in their discretion, may deem proper, without notice, either at any brokers' board or at public or private sale, and to apply the proceeds thereon), viz. 25 shares Owen Paper Co. stock. In case of depreciation in the market value of the security hereby pledged, or which may hereafter be pledged for this loan, a payment is to be made on account on demand, so that the said market value shall always be at least . . . per cent more than the amount unpaid of this note. In case of failure to do so, this note shall be deemed to be due and payable forthwith, anything hereinbefore expressed to the contrary notwithstanding, and the company may immediately reimburse itself by sale of the security. It is understood and agreed that, if such sale be by public auction, the said company shall be at liberty to purchase for its own account any property offered at such sale, and it is further agreed and understood that the above mentioned securities, or substitutes therefor, or additions thereto, shall also be held as collateral, and be applicable to any other note or claim held against us by said company, and that in case the proceeds of the whole of the collaterals shall not cover principal, interest,

and expenses, we hold ourselves bound to pay on demand any deficiency. Owen Paper Co., Henry D. Cone, Tr."

It was indorsed on the back: "Hy. D. Cone, Sarah B. Cone."

The declaration alleged that the individual defendants indorsed the instrument in blank before delivery, and that payment of the instrument was duly demanded of the maker, which neglected to pay the same, and due notice of its non-payment was given to the other defendants.

The answer set up "that, by the alleged contract of indorsement before delivery of the note declared on, the defendants Henry D. Cone and Sarah B. Cone are not liable upon the said note to the payee, the plaintiff herein, and that by the laws of the State of New York, where the contract was made, they did not by signing the said alleged note or contract undertake to pay the said plaintiff the amount of said note, or any sum whatever"; and "that the said alleged contract was made in the State of New York and was there to be performed, and they deny that the plaintiff ever demanded payment of the said note of the maker thereof as required by the law of that State."

The plaintiff filed the following replication:

"And now comes the plaintiff, and admitting that the contract contained in the promissory note set forth in the declaration in this case was made in the State of New York and was there to be performed, but not admitting any other of the facts set up in the defendants' answer, but denying the same, for replication to said answer the plaintiff says that, if the defendants shall prove that the law of the State of New York concerning the contract of indorsement or signature of a promissory note is anywise different from the law of this Commonwealth, it will then appear; and the plaintiff doth allege that the defendants are nevertheless liable to the plaintiff upon said note by the law of New York, and that the defendants Henry D. Cone and Sarah B. Cone signed the same upon the back intending thereby to become liable to the plaintiff thereon, and intending also to become security, surety, guarantor, or indorser for the promisor on said note, and to give the promisor credit with the plaintiff thereon, and the said Sarah B. intending also to give said Henry D. credit with the plaintiff thereon, and that neither said Henry D. nor Sarah B. intended in any event to hold, or to be entitled to

hold, the plaintiff liable thereon, but both of said parties did intend that the plaintiff should rely upon their said indorsements, and the plaintiff did so rely, and took said note on the faith thereof, as said Henry D. and Sarah B. well knew and intended, and that in consequence of said facts the said Henry D. and Sarah B., as well as the said Owen Paper Company, are liable to the plaintiff upon said note by the law of New York. And the plaintiff further says that said Henry D. and Sarah B. did, before the maturity of said note, waive demand of payment and notice of non-payment of said note, but that the plaintiff did make due demand for the payment thereof, which was refused, and that the plaintiff has done in that respect all things required by the law of New York to be done in order to hold the said defendants liable upon said note.

“ And the plaintiff further says, that since the bringing of this action it has indorsed said note without recourse above the signature of the defendants Henry D. and Sarah B., and that by the law of the State of New York it is entitled so to do, and that by said law the said two defendants are thereby made expressly liable to the plaintiff upon their said indorsements.”

Trial in the Superior Court, without a jury, before *Richardson, J.*, who reported the case for the determination of this court. Sarah B. Cone alone defended. The facts appear in the opinion.

H. C. Joyner & H. L. Dawes, Jr., (C. E. Burke with them,) for Sarah B. Cone.

J. B. Warner, for the plaintiff.

FIELD, C. J. This case was tried by the court without a jury, and comes before us on report. The court found for the plaintiff, and assessed the damages.

There was no variance between the note introduced in evidence and the note described in the pleadings. Taking the declaration and the replication together, they correctly describe the facts concerning the form of the note as they appeared when it was offered in evidence,* and by the law of Massachusetts, which was the only law of which the court could take notice at the stage of the case when the objection of a variance was made, the indorsement of the plaintiff after action brought was imma-

* The note offered in evidence bore, in addition to the indorsements set forth in the declaration, an indorsement purporting to be by the plaintiff, “without recourse,” written above the names of the defendants Cone.

terial. *Austin v. Boyd*, 24 Pick. 64. *Pearson v. Stoddard*, 9 Gray, 199. *Brown v. Butler*, 99 Mass. 179. *Baldwin v. Dow*, 180 Mass. 416.

The plaintiff put in evidence a paper signed by the defendant Sarah B. Cone, which was a waiver of demand, protest, and notice. By the law of Massachusetts, on the facts then appearing this defendant was an original promisor; but, under Pub. Sts. c. 77, § 15, to fix her liability she was entitled to have due demand made on the signer of the note, and due notice of such demand, and of its non-payment by him, unless she waived this right; and the paper was evidence that she had waived it. Upon the evidence introduced by the plaintiff it is manifest that the court could not rule, as matter of law, in favor of the defendant. Besides, the defendant did not rest on this evidence, but afterwards introduced evidence, and therefore could not compel the court to rule upon the plaintiff's evidence.

Some evidence of the law of New York was afterwards introduced, we infer by the defendant, and the court found as follows: "By the law of New York, where the note had its inception and was payable, a person who signs his name on the back of a negotiable note payable to the order of any party, and before the delivery of such note to the payee, is presumed to have signed with the intention of assuming the liability of a second indorser, and expecting the payee to indorse in full above his indorsement, and expecting to have recourse to the payee if compelled to pay the note, and that the payee cannot therefore enforce the note against such an indorser in the absence of evidence of a different understanding, but that this presumption is *prima facie* only, and may be rebutted or overcome by evidence showing that the indorser indorsed the note with the purpose of giving it credit with the payee, or intending to assume the position of indorser as toward the payee, or as surety or accommodation indorser for the maker with the payee, and that in any of these cases the payee may indorse the note without recourse and recover against such indorser, and that in the trial of causes in New York the indorsement of the payee without recourse may be put on at any time before judgment, or, being merely formal, will be assumed to be made. I also find that by the law of New York an indorser before delivery of a non-negotiable note is liable to the payee on the note as maker or guarantor."

The report recites that these findings as to the law of New York were not objected to by either party, and the evidence on which these findings were made is not before us.

The plaintiff, in rebuttal, put in evidence the answers of the defendant Sarah B. Cone to interrogatories filed by it, and also evidence that the indorsement of the plaintiff put on after suit brought was in "the handwriting of one J. Q. Adams, the secretary of the plaintiff company." The court found as follows: "I find upon the defendant's answers to the interrogatories to her, hereto annexed, and the said paper A (waiver of demand and notice), that the said defendant Sarah B. Cone signed her name on the back of the note in suit at her husband's request and to accommodate him either personally or as treasurer of the said Owen Paper Company, and that she intended that her husband should use the note and intended to give her credit to any one who might loan money on it. I do not find that she had any affirmative intention to assume merely the position of indorser after the plaintiff, nor had she any special affirmative intention as to this plaintiff particularly, in any way beyond that above stated, i. e. her intention to give her credit to any one who might loan money on the note."

The court also found as follows: "I find that if the note is negotiable, which I do not decide, — no evidence as to the law of New York was put in by either party on this point, — the plaintiff was entitled by the law of New York to indorse it without recourse and to hold the defendant liable as indorser; and if the note is not negotiable, then I find the defendant is liable thereon by the law of New York to the plaintiff as guarantor, and on the whole case that the plaintiff is entitled to recover from the defendant the amount of the note and interest." The defendant objected to the findings as to her liability, as not warranted by the evidence and the law of New York.

The report was amended, with the consent of the presiding judge, by a stipulation of the parties to the effect "that the law of New York regarding the negotiability of a promissory note is as stated in the case of *Hodges v. Shuler*, 22 N. Y. 114."

We assume, in favor of this defendant, without deciding it, that whether this is a negotiable promissory note, so far as the rights of the parties to it are concerned, is to be determined by

the law of New York, and that by that law the note should be considered as negotiable.

The defendant made twenty requests for rulings. The principal contention of the defendant is that the contract was to be governed by the law of New York, but this was the rule adopted by the court. All rulings requested on this subject have therefore become immaterial. The only requests which we think require to be noticed are the requests for rulings "that the legal effect of said waiver [waiver of demand and notice] was to excuse the making of demand and giving notice of dishonor, and beyond that it is evidence of nothing"; and "that there is no evidence of the indorsement of the State Trust Co. except evidence that it was written by the secretary, and there is no proof that he had any special authority to make the indorsement." We think that the paper A, which was signed by this defendant, and was directed to the State Trust Company, and in which she states that she is an indorser and waives demand, protest, and notice, was some evidence against her that she understood that she was such an indorser as by due demand and notice could be held liable on the note to the State Trust Company. The signing of such a paper was open to explanation, undoubtedly, but the explanation might not be satisfactory.

The court having found "that in the trial of causes in New York the indorsement of the payee without recourse may be put on at any time before judgment, or, being merely formal, will be assumed to be made," it was immaterial whether the secretary of the company had special authority to make the indorsement. It is not worth while to consider whether as secretary he had any such authority by virtue of his office, because the company by insisting upon the indorsement at the trial ratified what he had done.

The form of the note itself was some evidence that it was to be used in borrowing money of the plaintiff, and the whole evidence was sufficient to warrant the finding of the court in favor of the plaintiff. The defendant Sarah B. Cone was president of the Owen Paper Company, and had held that office since June, 1864, and with her husband owned nearly all the stock of the company. The note not only promises to pay to the order of the plaintiff, a trust company, the sum of twenty-five thousand dollars, but it recites that "25 shares Owen Paper

Co. stock" have been pledged to the plaintiff as security, "with authority to sell the same on non-performance of this promise, in such manner as they [the plaintiff], in their discretion, may deem proper, without notice, . . . and to apply the proceeds thereon," etc.; and authority is given to the plaintiff to purchase at the sale, if at public auction, and it is agreed that the securities, or any substitutes therefor or additions thereto, are to be held as collateral, and be applicable to any "other note or claim held against us by said company," etc. It is plain that the court could have found from the fact of this defendant having indorsed a note of this form before it was delivered to the payee, who is the plaintiff, that she expected it would be used to obtain a loan of money from the plaintiff, and understood that her name was required as additional security to the plaintiff that the note would be paid. There should be judgment on the finding.

So ordered.

LUCIUS C. RAND vs. CATHARINE SYMS.

Berkshire. September 11, 1894. — October 18, 1894.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

*Personal Injuries — Negligence — Law of the Road — Discretion of Justice —
Argument to Jury.*

In the conduct of a trial for injuries and damages caused by the plaintiff's gig being forced on the truss of a bridge and overthrown in consequence of the alleged negligent driving by the defendant of another conveyance, it is within the discretion of the presiding justice to prevent the plaintiff's counsel from using for the first time during his argument to the jury representations of the truss and gig, and to order their removal from the presence of the jury.

A person driving is not bound under all circumstances to keep to the right of the centre of the road, or to look behind him, when passing from one side to the other, but if he has reason to believe that a vehicle is behind him, or at his side, it is his duty not to obstruct it, and to use reasonable care in passing from one side of the road to the other not to injure it and its occupants, and in the event of an accident or collision it is for the jury to say whether the circumstances were such that the person driving in advance should, in the exercise of reasonable care, have looked behind or sideways.

TORT, for personal injuries occasioned to the plaintiff, and for damages to his horse and conveyance. The declaration alleged

that the defendant so negligently drove her horse, attached to a conveyance, that the plaintiff, his horse and conveyance, were crowded off the road and against a bridge, the conveyance thrown over, and the plaintiff thrown out and injured, and his horse and conveyance damaged. The answer was a general denial.

At the trial in the Superior Court, before *Richardson, J.*, there was evidence for the plaintiff tending to show that he drove upon the highway, where the defendant's conveyance was, from a side street which ran substantially at right angles thereto, passing in the rear of the defendant's conveyance to the left-hand side of the highway, the defendant's conveyance then being upon the right-hand side. From this point, the plaintiff followed the defendant's conveyance a distance of about sixteen rods, and at a distance of from one to two rods in the rear gradually overtaking the defendant's conveyance, until at a point just west of the entrance to the bridge, when the head of the plaintiff's horse was about opposite the forward wheel of the defendant's conveyance, which was about to enter upon the right-hand side of the bridge. The plaintiff was going at the rate of about five miles an hour and the defendant at about four miles an hour, and there was ample space upon the left-hand side for the plaintiff to pass the defendant, and this the plaintiff was then attempting to do. After the defendant's conveyance had entered upon the bridge it turned from right to left abruptly, and obliquely so that it was upon the left-hand side of the bridge and took up so much of the space on that side that there was not room for the plaintiff to pass without a collision with the defendant's conveyance. Thereupon the plaintiff, in attempting to avoid a collision, immediately reined in his horse to the left, so that in going a distance of about four feet, and before he was able to stop his horse, the north wheel of the plaintiff's gig was forced upon the north truss of the bridge for a distance of about three feet, and the gig tipped over toward the south, and the plaintiff was thrown out and injured, and the plaintiff's horse thrown down. Neither the plaintiff's horse nor his conveyance collided with the defendant's horse or conveyance, but the plaintiff's horse upon getting up passed over the bridge with the gig drawn upon the hub of the south wheel, and at the time the plaintiff was so thrown out the defendant's driver backed his conveyance over upon the right-

hand side of the bridge. The plaintiff's gig in overturning upon the hub of the south wheel and passing the defendant's conveyance occupied less space than the gig would have occupied if right side up. The diameter of the wheels of the plaintiff's gig was considerably less than the width of the gig from the outside of the hubs. The carriage path of the bridge was admitted to be eighteen feet and two inches wide.

There was evidence for the defendant tending to show that she entered upon the right hand side of the bridge and at no time passed over upon the left hand side, and she and her driver testified that neither of them saw the plaintiff, or knew that he was attempting to pass, until they saw him fall near her forward wheel, and that neither she nor her driver when entering upon the bridge, or while they were upon it, before the accident, looked back to see whether the plaintiff or anybody else desired or was attempting to pass. The defendant also testified that at the time of the accident her horse was walking, and that neither she nor her driver turned their horse and conveyance from the right-hand side of the bridge to the left-hand side, for there was no person or team approaching them in front, and they had no knowledge of the plaintiff or any one being behind them desirous of passing them, and there was no necessity for them to leave the right-hand side of the bridge.

In the argument to the jury, the defendant's counsel claimed that the plaintiff's gig in tipping over must have occupied a much greater space between the north truss of the bridge and the defendant's conveyance than it would if right side up, and that, as there was no collision with the defendant's conveyance, the latter must have been upon the right-hand side of the bridge; and in illustrating his argument upon this point he exhibited to the jury a sketch representing the plaintiff's gig standing right side up and also tipped over. The plaintiff's counsel during his argument to the jury, and for the purpose of illustrating the laws of motion as applied to the plaintiff's conveyance, and for the purpose also of illustrating his argument that the plaintiff's gig in tipping over would not occupy the space claimed by the defendant's counsel, had constructed and placed upon the table in front of the jury and then introduced for the first time a rough representation of the truss of the bridge and of a two-wheeled gig with shafts, which truss and gig so presented did

not represent the proportionate height of the plaintiff's gig to the truss of the bridge. The defendant's counsel objected to their introduction; and the plaintiff's counsel stated to the court that he did not desire or propose to use them in any sense as evidence, or to claim that they were a correct representation of the truss of the bridge or of the plaintiff's gig, but merely desired to use them to illustrate his claim that the gig in tipping over would not occupy more space than if right side up. The judge ruled that the representations of the truss and gig, not having been introduced in evidence or offered earlier in the case, should not be then used by the plaintiff's counsel in the way proposed, and upon the request of the defendant's counsel, and against the objection of the plaintiff, ordered them removed from the presence of the jury, stating that if they had been offered before the counsel for the defendant had argued, they would probably have been admitted for the purpose suggested; to which refusal and order of the judge the plaintiff excepted.

The plaintiff requested the judge to rule as follows:

"1. If the defendant's conveyance was being driven so that any part or all of the same extended over the middle line of the travelled path of the way, or over the middle line of the bridge, then such conveyance was in that part of the way or bridge reserved by law for the use of travellers who might meet the defendant going in the opposite direction, or travellers who might desire to pass the defendant going in the same direction, and if the defendant or her driver drove from the right hand side of the bridge to the left-hand side of the same without first attempting to ascertain whether the plaintiff was behind and about to pass the defendant's conveyance, and the position of the defendant's conveyance so taken was the proximate and sole cause of the injury, the plaintiff is entitled to recover if at the time of his injury he was in the exercise of ordinary care and prudence. 2. If the defendant's conveyance, or any part thereof, was upon the left-hand side of the middle line of the travelled part of such way, or the middle line of said bridge, without necessity such as to avoid danger of collision with other teams, persons, or objects, then such conveyance was unlawfully there. If the defendant and her servant took no pains to ascertain whether the plaintiff was behind and attempting to pass on the left-hand side, and if this was the cause of the plaintiff's injury,

then he is entitled to recover if he was in the exercise of due care at the time. 3. If the defendant's conveyance was on the left-hand side of the bridge this fact is some evidence of negligence of the defendant. 4. If, at the time the plaintiff attempted to pass the defendant's conveyance upon the bridge, there was ample room for him to do so upon the left, he had a right to make the attempt, and such attempt was not negligence, and he was not bound to attempt to pass upon the right. 5. If what the plaintiff did under all the circumstances was that which a man of ordinary care and prudence would have done, then he was not guilty of negligence."

The judge gave the fifth request, but refused to give the other requests, except as hereinafter stated, and among other instructions gave the following :

"Among the plaintiff's requests for rulings is this: 'If the defendant's conveyance was on the left-hand side of the bridge this fact is some evidence of negligence of the defendant.' If that is a fact, it is some evidence of the negligence of the defendant, but I cannot give that without some qualification, because . . . a party driving along a road or across a bridge has a right, unless he is about to meet somebody, or unless somebody is behind and wants to pass, to go in the centre of the road, or on the left hand side, or on the right hand side, just as his convenience or pleasure dictates.

"It is only when he is about to meet somebody that the law obliges him to go to the right, and then perhaps I will add, in the other case, when a party is behind trying to pass him, and he has some notice or knowledge that such person is trying to pass him, that he ought to turn to the right or left, whichever the case may be; ordinarily, of course, as the law says, a party passing should pass to the left, and it would naturally follow, although the law does not say so in express terms, that the party in front would naturally turn to the right, because that would be a proper thing for him to do. But at other times when you are driving . . . I do not understand it to be your duty to drive on the right-hand side of the road always, under all circumstances, everywhere. Nor do I understand it to be the duty of the party driving along a highway to look behind him or see what is going on behind him. His duty naturally would be to look ahead, in the street.

"The plaintiff also asks me to rule, 'If, at the time the plaintiff attempted to pass the defendant's conveyance upon the bridge, there was ample room for him to do so upon the left, he had a right to make the attempt, and such attempt was not negligence, and he was not bound to attempt to pass upon the right. That might or might not be so. . . . If one desires so to pass a person, it might depend upon the circumstances, the situation, and . . . the facts at the time.'"

The plaintiff at the close of the instructions made the following oral request: "It was the duty of the defendant before crossing from the right to the left hand side of the bridge to look behind to see whether the plaintiff or some other person were not about to pass."

Thereupon the judge further instructed the jury:

"I simply repeat to you the general duty of a man to look on either side of him, or behind him, under some circumstances. . . . I can imagine that if a person were driving through a crowded way, like Washington Street in Boston, where there is a row or two of cars or carriages on either side or behind, he might have to look almost everywhere; and there might be cases where you are driving along a country road, or across a bridge, where your whole duty would be accomplished if you looked ahead. I would say, if there were any circumstances in the case which in the exercise of due care required the defendant to look behind as well as forward, they are for you to consider. . . . It is a question for the jury whether the defendant in this case should have looked behind or sideways; and in determining that question you are to bring your knowledge, intelligence, and experience here, and exercise it upon these cases. . . . There may be, or might be, circumstances which would require a party to turn out to the right, without knowing there was any person behind wanting to pass, but I do not undertake to give or state such circumstances."

Thereupon the plaintiff's counsel orally asked the judge to rule that, before a party can take the risk of driving from the right-hand side to the left-hand side of the bridge, he must look behind him to see if anybody desires or is attempting to pass him upon the left; and the judge then gave the following further instruction to the jury:

"I have just stated that there might possibly be circumstances

which would require a man to look, or turn to the right, . . . without notice that there was any person behind, . . . but I do not undertake to state a case to the jury. I have already stated that when a party is driving, and another person comes up behind and makes a request to go by, or undertakes to go by, and the other party sees him or has notice of his presence, then there may be a duty on the part of the person in front to take such course as may avoid a collision and avoid injury."

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

M. E. Couch & C. J. Parkhurst, for the plaintiff.

T. P. Pingree & H. L. Dawes, Jr., (*C. E. Burke* with them,) for the defendant.

MORTON, J. It was not contended at the trial by the plaintiff's counsel that the representations of the truss and of the gig were correct. He expressly stated that he did not claim that they were. They were not a part of the evidence in the case. The defendant had no opportunity to cross-examine concerning them or to criticise them; and although the only use which the plaintiff's counsel proposed to make of them in his argument was to illustrate, in reply to the argument of the defendant's counsel, the amount of space which the gig would occupy in tipping over, we think that it was competent for the court, in the exercise of a reasonable discretion regarding the conduct of the trial, to prevent the plaintiff's counsel from using them as he proposed, and to direct their removal from the jury's presence. *Commonwealth v. Piper*, 120 Mass. 185. *Probert v. Phipps*, 149 Mass. 258. *Farnum v. Pitcher*, 151 Mass. 470, 476. *Commonwealth v. Poisson*, 157 Mass. 510. *Commonwealth v. Thompson*, 159 Mass. 56, 58. This is very far from saying, as the plaintiff in effect contends must be the case if the action of the presiding judge is sustained, that the court can interfere to any extent that it sees fit with the argument of counsel. See *Commonwealth v. Brownell*, 145 Mass. 319.

The instructions given by the court were sufficiently favorable to the plaintiff, and those requested by him were properly refused. The defendant was not bound under all circumstances to keep to the right of the centre of the road, nor to look behind her when passing from one side to the other. *Lovejoy v. Dolan*,

10 Cush. 495. *Meservey v. Lockett*, 161 Mass. 332. If a team was approaching in the opposite direction, it was her duty to turn to the right, and if she had reason to believe that the plaintiff was behind her, or at her side, it was her duty not to obstruct him, and to use reasonable care in passing from one side of the road to the other not to injure him. It is not the duty of a traveller under all circumstances, before crossing from one side of a sidewalk or road to the other, to look behind him or sideways before doing so. The court in substance told the jury that it was for them to say whether the circumstances were such that the defendant in the exercise of reasonable care should have looked behind or sideways, and the jury by their verdict have found that they were not. The jury have settled the facts against the plaintiff, and we discover no error in law on the part of the court. *Exceptions overruled.*

CATHERINE E. P. NICHOLS *vs.* INHABITANTS OF RICHMOND.

Berkshire. September 12, 1894. — October 18, 1894.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

Grade Crossing — Land Damages — Discontinued Portion of Way.

Premises which touch only at two corners that portion of a way within a railroad location discontinued under St. 1890, c. 428, do not in any proper sense abut upon such discontinued portion of the way, though they do upon other portions of it.

If a person has been obliged, in passing from one portion of his premises to another, to use a way of which a part on which his premises do not abut has been discontinued under St. 1890, c. 428, and, in consequence thereof, is compelled to use a longer and more circuitous and less convenient route over a new way substituted for and provided in place of the discontinued portion, he cannot recover damages for the inconvenience resulting from the discontinuance.

PETITION, for the assessment of damages under St. 1890, c. 428, § 5, as amended by St. 1891, c. 123. By due proceedings in the Superior Court, upon petition of the respondent town and the Boston and Albany Railroad Company, certain grade crossings in the town were abolished, an overhead crossing was constructed, a new way was laid out over the land of the petitioner,

and so much of an ancient public way across the railroad as was within its location was discontinued.

At the trial in the Superior Court, before *Mason*, C. J., it appeared that the petitioner's farm abutted on the northerly side thereof upon said ancient public way, and comprised about sixty-five acres; that, before the railroad was located, Eleazor Williams, the father of the petitioner, owned the farm, together with the land which at the time of the trial was within the railroad location through it, and used the whole as one farm; that in 1838 he conveyed to the railroad company the land occupied later by the railroad location, and this conveyance left the farm in two portions, both abutting on the ancient public way and on the land occupied by the railroad location. The portion on the westerly side of the railroad, comprising about two acres, had upon it the dwelling-house and farm buildings, and the portion on the easterly side comprised the remainder of the farm. The petitioner's title was by descent and mesne conveyances from Williams. It also appeared that from the construction of the railroad to the discontinuance of the portion of the ancient public way the farm had been owned and used as one tract; that the stock kept thereon was housed on the westerly side of the railroad, and in the season for pasturage was driven night and morning over the discontinued portion of the way; that the crops and the manure used in cultivation were hauled over it; and that travel over the discontinued portion of the way was constant and continuous, as occasion existed, for all purposes required in the operation of the farm, and there was no private crossing of the railroad between said portions of the farm. By the proceedings aforesaid a new public way was laid out over the land of the petitioner, by which a more circuitous and less convenient route between the two portions of the farm was provided.

The petitioner claimed damages for injury to her farm by the laying out and construction of the new way, and by the discontinuance of the portion of the ancient public way, but no other or different element of damage from such discontinuance than herein stated was presented. Under the direction of the Chief Justice, the jury assessed the damages separately, those for laying out and constructing the new way at one hundred and

twenty-five dollars, and those for discontinuing the old way at one thousand dollars. The Chief Justice ruled that the petitioner could not recover as damages for discontinuance of that portion of the highway within the railroad location, the injury to her farm resulting from the fact that the travel on the highway required in its operation must, in consequence of such discontinuance, be by a longer and more inconvenient route, and ordered judgment for the petitioner in the smaller sum. Thereupon the case was reported, by consent of the parties, for the determination of the Supreme Judicial Court. If the ruling was erroneous, judgment was to be entered for the petitioner, in the sum of eleven hundred and twenty-five dollars, with interest; otherwise, in the sum of one hundred and twenty-five dollars, with interest.

J. F. Noxon, for the petitioner.

C. E. Hibbard, for the respondent.

MORTON, J. The petitioner's premises were situated on both sides of and adjoined the railroad, and were on the northerly side of the way. They touched only at two corners that portion of the way within the railroad location which was discontinued. They did not, therefore, in any proper sense, abut upon the discontinued portion of the way, though they did upon other portions of it, and the case presented is that of a party who has been obliged, in passing from one portion of her premises to another, to use a way of which a part on which her premises do not abut has been discontinued, and who is compelled, in consequence of such discontinuance, to use a longer and more circuitous and less convenient route over a new way substituted for and provided in place of the discontinued portion. It is well settled, we think, in this Commonwealth, that under such circumstances a party cannot recover damages for the inconvenience resulting from the discontinuance. *Quincy Canal v. Newcomb*, 7 Met. 276. *Smith v. Boston*, 7 Cush. 254. *Brainard v. Connecticut River Railroad*, 7 Cush. 506. *Hartshorn v. South Reading*, 3 Allen, 501. *Willard v. Cambridge*, 3 Allen, 574. *Blackwell v. Old Colony Railroad*, 122 Mass. 1. *Davis v. County Commissioners*, 153 Mass. 218. *Hammond v. County Commissioners*, 154 Mass. 509. *Shaw v. Boston & Albany Railroad*, 159 Mass. 597, and cases cited. The line has to be

drawn somewhere, on practical grounds, between those who may and those who may not recover for damages caused by the discontinuance, in whole or in part, of a street or way; and it has been drawn so as to limit the right of recovery to damages which are special and peculiar, and different in kind from those suffered by the public at large. In the present case, although, owing to the proximity of her premises to the discontinued portion of the way, and to the use which she made of them, the inconvenience and damage to the petitioner were greater than to others having occasion to use the way, the difference was one of degree, and not of kind. She was obliged to travel farther than before in passing to and fro between the different portions of her farm. But every one who passed over the way was subjected to a similar inconvenience. The fact that she had no farm crossing over the railroad cannot affect the result. The absence of such a crossing obliged her to use the way more than she otherwise would have done; but it did not change the character of her user as compared with that of the public at large.

According to the terms of the report, the entry must be judgment for the petitioner for one hundred and twenty-five dollars and interest, and it is

So ordered.

CLEMENT MANUFACTURING COMPANY vs. EDWARD E. WOOD.

Hampshire. September 18, 1894. — October 18, 1894.

Present: ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

Report of Special Master — Equity — Mill-Dam — Decree.

No objection lies to the report of a special master if the matters determined by him as stated therein were involved in the issue made up by the parties, and were properly considered by him and included in the report.

KNOWLTON, J. This is a suit in equity brought by the owner of a water mill against the owner of another mill further down the stream, to compel him to reduce the height of his dam.

The parties filed an agreement in writing that the case should be referred to a special master, to "hear the parties, view the premises, and ascertain the true height of the mill-dam referred to in the pleadings in said cause, and fix the same by some suitable permanent monument, to be erected under his direction, and make report thereof to the court," and an order of reference was made by the court in accordance with this agreement. The master heard the parties, the plaintiff's manager being present at the hearing, and afterwards notified them that he was ready to erect the monument to define the height of the dam referred to in the pleadings, which was the defendant's dam, and asked that they contribute equally towards the expense of making this erection, which they did. He then established the monument, and made his report to the court, stating that the defendant's dam had not been raised above the height at which the defendant had a right to maintain it, and setting out his doings in regard to the erection of the monument, and defining by reference to the monument the height at which the defendant could lawfully maintain the dam. The plaintiff filed objections to the report, on the ground that the true height of the defendant's dam, at which he had a right to maintain it as found by the master, was greater than the height at which it was maintained when the suit was brought, and that this finding was outside of the issues involved or submitted in the case; and it subsequently offered to prove the fact alleged in the objections. The justice of the Superior Court who heard the case was of opinion that the plaintiff was not entitled, as a matter of right, to introduce evidence of this allegation, and in his discretion excluded it, and he afterwards entered a decree for the defendant in accordance with the findings of the master, and reported the case for the consideration of this court.

The first and principal question is whether the decree was warranted by the pleadings and the master's report. It is contended that the report deals with matters which are not in issue or involved in the case, but we think there is no good ground for this contention. The plaintiff alleges in its bill, and the defendant admits in his answer, that there is a fixed point up to which the defendant has a right to maintain his dam. The plaintiff alleges in its bill, and the defendant denies in his

answer, that the defendant has maintained his dam above that point. The controversy involves two questions; first, what is the height of that point, and secondly, up to what height has the defendant maintained the dam. The prayer of the bill is that the defendant be enjoined from keeping up the dam "any higher than its height before said work was entered upon, or than the defendant has a legal right to maintain the same," etc. The important question in dispute was to what height the defendant's ancient right to maintain his dam extended, and it was precisely this point which the master, an eminent hydraulic engineer, was appointed to determine. It would be impossible properly to decide the case without passing upon this question, and a report which failed to deal with it would be irregular and imperfect.

It does not appear upon the record that the point established by the master is higher than the dam as it was when the suit was brought. The plaintiff in his objections alleges that it is, but the defendant denies it. If the fact were material, the proper way to present it would be by a motion to recommit, with instructions to the master to report in regard to it, but we are of opinion that it is immaterial. While the plaintiff in its bill only asks to have the dam lowered, its prayer is founded on an allegation that the dam is higher than the point at which the defendant can lawfully maintain it. The position of that point is necessarily involved in the issue made up by the parties, and it is a matter to be determined no less if it proves to be above the present height of the dam than if it proves to be below it. The findings in regard to it were rightly recited in the report and in the decree, and the parties will be forever bound by the decree in regard to all matters actually heard and determined which were expressly put in issue, or were necessarily involved in the issue. *Watts v. Watts*, 160 Mass. 464. All this was contemplated by them when they made the agreement which was put on file.

Decree affirmed.

W. G. Bassett, for the plaintiff.

J. C. Hammond, (*H. P. Field* with him,) for the defendant.

JOHN W. HERSEY vs. WALTER H. CHAPIN & others.

Hampden. September 25, 1894. — October 18, 1894.

Present: ALLEN, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

*Trespass — Board of Health — Infectious Disease — Action — Tenant at Will —
Damage to Reversion.*

The board of health of a city cannot, without the consent of the owner, lawfully establish and use premises as a hospital for patients sick with the small-pox, except under a warrant issued in accordance with the provisions of Pub. Sta. c. 80, § 43.

An owner of land, who is not in possession and has no right of possession thereof, cannot maintain an action of trespass *quare clausum fregit*, but may maintain an action for an injury to the reversion.

The owner of a house in a city which, while in the possession of a tenant at will, is taken and used, without the owner's consent, by the board of health of the city as a hospital for parties sick with the small-pox, may maintain an action against the members of the board for the injury to his reversion, if it appears that such use of the house diminished its rentable value.

A tenant at will in possession of a house in a city cannot, as against the rights of the owner, authorize the board of health of the city to establish in the house a hospital for patients afflicted with an infectious disease, and to maintain such a hospital there to the damage of the reversion.

TORT, in three counts. The first count was for breaking and entering the plaintiff's close in Springfield. The other counts were for taking possession of and using the plaintiff's premises without his consent, as a hospital for patients sick with the small-pox. Trial in the Superior Court, before *Dewey, J.*, who allowed a bill of exceptions, in substance as follows.

The defendants constituted the board of health of the city of Springfield for the year 1893. It appeared in evidence that the plaintiff was the owner of a building in Springfield, worth about \$3,000, which was occupied by two tenants, both holding as tenants at will, one of whom was named Collins. On February 16, 1893, the physician who had been attending a son of Collins, who lived with his father, announced that he was sick with the small-pox, and reported the case to the agent of the board of health. On the same day, after the case had been reported, one Bridget Dowling visited the tenement of Collins, went to the door of the room in which the son was sick in bed, stood at

the threshold of the door a short time, and there contracted and subsequently came down with the small-pox. On the morning of February 17, the defendants, acting by their agent, went to the house, posted up notices that it was infected with the small-pox, hung up a red flag, and stationed an officer on the outside of the building to regulate the ingress and egress therefrom. The agent of the board suggested that the patient be removed, but his physician refused to allow his removal, and his parents insisted that he be allowed to remain with and be cared for by them; and the other tenant in the building did not object to his so remaining. From February 17 to March 22 the board of health maintained a guard around the house, and during that time the same was effectually quarantined; and on March 22 the premises were thoroughly, properly, and effectively disinfected, and the quarantine was raised, and any control over the premises by the board was released. At the expiration of the proper period of time, Bridget Dowling came down with malignant small-pox. She was rooming in another part of the city, and, up to the time she came down, the son of Collins who was sick had been attended by his own physician, and the affairs of the Collins family were, in the matter of nursing the son, cooking, and caring for the family, managed and controlled by them; the board of health, however, provided for the family some disinfectants, groceries, and coal, and perhaps a few other articles. On a certain night, after dark, about two days after Dowling was taken sick, the Collins family, without any authority from or any knowledge of the defendants, or any person acting for them, sent a person, who came to the window and talked with them, to the room of Dowling, and had her brought to their house, where her presence was not known to the defendants, or any one representing them, until the next morning, when they learned of the fact, and of her sickness with the small-pox. As soon as the plaintiff learned of the presence of Dowling in the house, he demanded of the defendants that she be removed to the pesthouse; which demand was not complied with. At the time the Collins family had Dowling removed to their tenement, the son, though much better, was still sick; but there was evidence tending to show that, had Dowling not been taken there, the house would have been opened to the

public on the Saturday following. Dowling remained in the house under the care of her own physician, and nursed by the Collins family, for about a week, when she died. It appeared that the tenants who were in the house remained and paid their rent until the September following, when the upper tenant vacated; and that the Collins family remained, and were tenants at the time of the trial. There was evidence tending to show that applicants for the vacant tenement objected to hiring the same on being informed by the plaintiff that the small-pox had been in the building, although assured that it had been thoroughly and properly disinfected; that it was more difficult to disinfect a building after there had been in it a type of small-pox such as Dowling had, than after such a type as that with which the son of Collins was sick; that fifteen days' properly disinfecting would be a safe period after which to allow persons to rent and occupy the building; and that, if no small-pox appeared from its use up to the time the tenement was vacated, it would show that the building was effectually disinfected.

The jury found specially that the defendants, as a board of health, by their acts established and carried on the premises as a hospital; and there was evidence not herein stated tending to show that they so established and carried on the premises.

The defendants requested the judge to instruct the jury as follows: "1. On all the evidence in the case the plaintiff cannot recover. 2. If the defendants took possession of the house with the consent of the tenants, the plaintiff cannot recover. 3. If, at the time the defendants took possession of the premises, they were in an infected condition, the plaintiff cannot recover. 4. If the patient Dowling was taken to the premises without the knowledge or consent of the defendants, or of any party lawfully representing them, the plaintiff cannot recover any additional damages by reason of her having been taken to the house. 5. Under the evidence in the case, the admission of Dowling to and her sickness in the house are not to be considered as an additional element of damage."

The judge declined to give the instructions requested, and instructed the jury that, although the right of possession was in the tenants, it was a question of fact for them whether the use of the premises by the defendants affected their market value;

that if such use affected the substance or value of the property, then the plaintiff might recover whatever damage such use caused; that he could not recover for any damage to the value of the property which resulted from the small-pox having been in the premises prior and up to February 17; that it made no difference with the rights of the plaintiff that the tenants consented that the son should remain in the building; that the defendants would not be liable for the admission of Dowling to the premises, but would be liable for thereafter using the premises as a hospital for her care, and for any damage which such use caused the plaintiff by its affecting the market value of the property; that the plaintiff was not entitled to recover any damage except such as affected him as owner, in distinction from an occupant of the premises; and that the injury must affect the substance of the premises, and thereby affect their market value.

The jury returned a verdict for the plaintiff; and the defendants alleged exceptions.

C. L. Long, for the defendants.

E. H. Lathrop, for the plaintiff.

KNOWLTON, J. In this case the jury found specially, from evidence a part of which is not reported, that the defendants, acting as a board of health, established and used the plaintiff's premises as a hospital. This they could not lawfully do without the consent of the owner, except under a warrant issued in accordance with the provisions of Pub. Sts. c. 80, § 43. The finding of the jury, therefore, establishes, for the purposes of this case, the proposition that the defendants acted without lawful authority, and that they are therefore liable to any person who suffered damage in his property from their unlawful act. *Spring v. Hyde Park*, 137 Mass. 554. *Brown v. Murdock*, 140 Mass. 314, 317.

The plaintiff was not in possession, and had no right of possession, of the property used, and he cannot maintain an action of trespass *quare clausum fregit*. *Bascom v. Dempsey*, 143 Mass. 409. *Gooding v. Shea*, 103 Mass. 360. *Woodman v. Francis*, 14 Allen, 198. But the declaration contains counts for an injury to the reversion, and the question is whether there was evidence to warrant the finding that there was such an injury.

The tenants in possession were only tenants at will, and the plaintiff as owner could terminate their respective tenancies at short notice. If he wished so to do, the fact that the premises had been used as a hospital for patients sick with small-pox might naturally diminish their rentable value. In that way the plaintiff's right may have been affected to his detriment.

It appears that one of the tenements became vacant a few months after the guard was removed from the house, and there was evidence that applicants for the tenement objected to hiring it on learning that small-pox had been in the building. The jury might well find that the plaintiff suffered damage in this way.

The tenant at will in possession could not, as against the rights of the owner, authorize the defendants to establish a hospital for patients afflicted with an infectious disease in the plaintiff's house, and to maintain such a hospital there to the damage of the reversion. An attempt to do that would have been a violation of the owner's right which would have justified him in treating the tenant as a trespasser. *Chalmers v. Smith*, 152 Mass. 561.

We are of opinion that the rulings requested were rightly refused, and that the instructions given were correct and sufficient.

Exceptions overruled.

FIRST NATIONAL BANK OF GREENFIELD vs. JUDSON H. COFFIN.

Franklin. September 26, 1894. — October 18, 1894.

Present: KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Meaning of Word — Expert — Exclusion of Testimony — Remoteness.

A witness cannot testify as to what he understood by a word in a letter to him, if the word is not a technical term, has no peculiar or local signification, and there are no extrinsic facts to create ambiguity, and if also, so far as appears, the witness has no better means of understanding the word than the jury.

A witness who was offered as an expert upon the market value of real estate knew nothing about it except what he was told by others, and what he saw of it during

a visit of six days. He was permitted to state the facts he observed tending to show its value; and there was nothing to indicate that the judge erred in holding that the witness had no such actual knowledge of market values in the place of location as to make his opinion competent. Moreover, the time to which his information related was more than a year and a half after the time of the alleged fraudulent sale in question, and his statement as to the condition of the buildings on the property indicated a great depreciation in values. *Held*, that the witness had no such knowledge of the market value of real estate at the place of location as to entitle him to give an opinion in regard to it, and that the testimony might well have been excluded on the ground of remoteness.

CONTRACT, upon a promissory note dated October 16, 1893, by the indorsee against the maker. The defence was fraud as between the original parties in the sale of certain lands at Kearney in the State of Nebraska, and failure and want of consideration, and that the plaintiff took the note with knowledge of these infirmities.

At the trial in the Superior Court, before *Mason*, C. J., the defendant called the president of the plaintiff bank as a witness, who testified to the receipt by him of a letter from one Butman asking information concerning Henry D. Watson of Kearney in the State of Nebraska, who was the payee and indorser of the note, and to the writing by the witness of a reply which contained the words "Henry D. Watson has been a customer of this bank for the past ten years. We have found him reliable in our deal, and have full confidence in any statement he makes." In answer to questions of the defendant, the president testified that he meant by the word "deal" the "dealings" of the bank with the indorser, Watson; and no objection was made by the plaintiff bank to either the question or answer. The defendant then called Butman as a witness, and asked him, "What did you understand by the word 'deal' in the letter referred to?" On the plaintiff's objection, the question was excluded, and the defendant excepted.

The note was the last of three renewals of a note given by the defendant to Watson, at his request, as collateral to certain mortgage notes given by him upon and for an undivided interest in lands bought by him of Watson in the spring of 1892, which lands the defendant contended were of little or no value, and of a different character from that represented by Watson.

Butman testified for the defendant that in November, 1893, he visited Kearney and examined the lands; that they were of

poor quality, open prairie covered with buffalo grass; that in the vicinity were a cotton mill and a woollen mill, neither in operation at the time of his visit, nor apparently for a long time previous, and also a railroad depot with windows and doors boarded up and not in use. Butman was then offered as an expert upon the value of these lands, and testified that he investigated their value by conversations with the principal man of the town, a real estate dealer, as well as with other men of means and long habitation there; that he inquired of the storekeepers as to the property in the vicinity, and the character of the inhabitants, as to how their livelihood was gained, and whether or not such land was desirable for specific purposes; that he talked with from fifteen to twenty-five or thirty people in all; that he visited some portions of the land four or five times, going over the town from one end to the other on nearly every foot of it in a carriage with an old inhabitant; and that he was engaged there about six days. He was then asked what "the market value of those lands, including Mr. Coffin's land, was."

On the plaintiff's objection the question was excluded; and the defendant excepted.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

S. H. Dudley, for the defendant.

J. A. Aiken, for the plaintiff.

KNOWLTON, J. 1. The question to the witness Butman, "What did you understand by the word 'deal'?" was rightly excluded. No reason appears for introducing evidence in regard to the meaning of the word. It is not a technical term, it has no peculiar or local signification, and no extrinsic facts appear in the case to create ambiguity. Besides, so far as appears, the witness had no better means of understanding it than the jury had.

2. The witness had no such knowledge of the market value of real estate in Kearney, Nebraska, as to entitle him to give an opinion in regard to it. He knew nothing about it except what he was told by others, and what he saw of the place in a visit of six days. The facts that came under his observation which would tend to show the value of the property he was permitted to state to the jury. There is nothing to show that the judge erred in holding that he had no such actual knowledge of market

values there as to make his opinion competent; moreover, the time to which his information related was more than a year and a half after the time of the alleged fraudulent sale, and his finding that the cotton mill and the woollen mill in the vicinity were not in operation, and that the railroad depot was not in use, but had its windows and doors boarded up, indicates that there had been a great depreciation in values there. The testimony might well have been excluded, on the ground that it was too remote in point of time.

Exceptions overruled.

COMMONWEALTH vs. PARDON H. DERBY, JR.

Hampden. September 26, 1894. — October 18, 1894.

Present: ALLEN, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Complaint — City Ordinance — “Stop.”

An ordinance of a city was as follows: “No person shall stand with or permit any team under his care or control to stand across any public highway or street in such a manner as to obstruct the travel over the same, and no person shall stop with any team in any public street at the side of or so near to another team as to obstruct public travel, and no person shall stop with any team or carriage upon or across any crosswalk in any street or highway in the city.” *Held*, that a complaint for a violation of the last clause of the ordinance, which set out the offence in the language of the ordinance, with a description of the team and a designation of the walk by reference to the street on which it was, was sufficient, without alleging that public travel was obstructed or that the defendant intended to obstruct it.

The following ordinance of the city of Springfield is reasonable: “No person shall stand with or permit any team under his care or control to stand across any public highway or street in such a manner as to obstruct the travel over the same, and no person shall stop with any team in any public street at the side of or so near to another team as to obstruct public travel, and no person shall stop with any team or carriage upon or across any crosswalk in any street or highway in the city.”

COMPLAINT, for a violation of an ordinance of the city of Springfield. At the trial in the Superior Court, before *Maynard, J.*, the jury returned a verdict of guilty; and the defendant alleged exceptions. The facts appear in the opinion.

E. H. Lathrop, for the defendant.

C. L. Gardner, District Attorney, for the Commonwealth.

KNOWLTON, J. The only question in this case arises upon the defendant's motion to quash the complaint "because no offence was properly alleged therein." The prosecution is under an ordinance of the city of Springfield, one section of which is as follows: "No person shall stand with or permit any team under his care or control to stand across any public highway or street in such a manner as to obstruct the travel over the same, and no person shall stop with any team in any public street at the side of or so near to another team as to obstruct public travel, and no person shall stop with any team or carriage upon or across any crosswalk in any street or highway in the city." The defendant is charged with having violated the last clause of this section, and the offence is set out in the language of the ordinance, with a description of the team, and a designation of the walk by reference to the street on which it is. It is not contended that the complaint is defective in this particular. See *Commonwealth v. Barrett*, 108 Mass. 302.

It is argued that the complaint should charge that public travel was obstructed, or that the defendant intended to obstruct it. But such an allegation is unnecessary. The language of the ordinance in regard to the obstruction of travel applies only to standing with a team across the highway or street, and to stopping with a team at the side of or near to another team. To stop with a team or carriage upon or across a crosswalk is made an offence by itself, without reference to actual obstruction of public travel, or to an express intent to obstruct it. The obvious reason of the provision is, that such stopping would be likely to interfere with the convenience of the public in passing from one side of the street to the other, even though actual obstruction could not be shown. We are of opinion that, in a city where there is much travel by pedestrians, and where crosswalks are built for their accommodation, such an ordinance is reasonable.

What construction should be given to the word "stop," in the connection in which it is used, is a question which we have no occasion in this case to decide. Very likely it should be held to mean something more than to halt for an instant under an exigency which would require or justify halting.

Exceptions overruled.

THOMAS DOWD vs. BOSTON AND ALBANY RAILROAD
COMPANY.

Hampden. September 26, 1894. — October 18, 1894.

Present: ALLEN, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Employers' Liability Act — "Superintendence."

In an action under the employers' liability act, St. 1887, c. 270, for personal injuries occasioned to the plaintiff while in the defendant's employ by the negligence of A., there was a great deal of evidence, which was uncontradicted, to show that A. was regularly working with five or six other men in the defendant's service; and that he was paid the same price for his work as his fellow laborers. It was proved and not disputed that B. was the defendant's general superintendent, in charge of the work of these men and others engaged on the same job; and that he had other duties which took him away from the building for a considerable part of the time. It also appeared that C. was a foreman under him, whose special work was with the carpenters, and who hired men and exercised superintendence, more or less, in B.'s absence, on that part of the work where A. was engaged, which was connected with the carpenters' work. The evidence tended to show that A. received orders from B. or C. in regard to the work to be done by himself and those working with him, and gave his fellow laborers directions about the work in the absence of B. *Held*, that there was no evidence to warrant a finding that A.'s sole or principal duty was that of superintendence, within § 1, cl. 2, of the statute.

TORT, under the employers' liability act, St. 1887, c. 270, for personal injuries occasioned to the plaintiff while in the defendant's employ. At the trial in the Superior Court, before *Mason*, C. J., it appeared that the plaintiff was injured by being struck by a cement pipe, which was rolled off the top of a roundhouse, the roof of which was being repaired by the defendant's workmen, while the plaintiff was ascending a ladder leading to a staging at one side of the roundhouse on which he was employed. The judge, at the defendant's request, ruled that the plaintiff could not recover, and directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions. The facts material to the point decided appear in the opinion.

E. H. Lathrop, for the plaintiff.*W. H. Brooks*, for the defendant.

KNOWLTON, J. The plaintiff seeks to recover under the first count of his declaration, which alleges that he was an employee of the defendant, and was injured by reason of the negligence of a person in the service of the defendant, who was intrusted with or exercising superintendence, and whose sole or principal duty was that of superintendence. There was evidence to warrant the jury in finding that the plaintiff was in the exercise of due care, and that there was negligence on the part of one or more of the defendant's employees. The only difficult questions in the case are whether McDonald was a person whose sole or principal duty was that of superintendence; and if so, whether his negligence, if he was negligent, was in the performance of his duty of superintendence.

The evidence is voluminous, and it would be unprofitable to discuss it in detail. There is a great deal of testimony to show that McDonald was regularly working with five or six other men in the service of the defendant, and there is no evidence which tends to contradict this. There was testimony that he was paid the same price for his work as his fellow laborers, and this was not contradicted. It was proved, and not disputed, that one Cady was the general superintendent of the defendant in charge of the work of these men and others engaged on the same job, and that he had other duties which took him away from the building for a considerable part of the time. It also appeared that one Cuff was a foreman under him, whose special work was with the carpenters, and who hired men and exercised superintendence, more or less, in Cady's absence, on that part of the work where McDonald was engaged, which was connected with the carpenters' work. The evidence tended to show that McDonald received orders from the general superintendent, or from Cuff, in regard to the work to be done by himself and those working with him, and gave his fellow laborers directions about the work in the absence of Cady. We think there was evidence to warrant a finding that he exercised some acts of superintendence in the narrow field in which he was working, but that there was no evidence to warrant a finding that his sole or principal duty was that of superintendence. *Shepard v. Boston & Maine Railroad*, 158 Mass. 174. *Davis v. New York, New Haven, & Hartford Rail-*

road, 159 Mass. 532. *Cashman v. Chase*, 156 Mass. 342. *Shaffers v. General Steam Navigation Co.* 10 Q. B. D. 356. *Kel-lard v. Rooke*, 19 Q. B. D. 585; *S. C.* 21 Q. B. D. 367.

The jury were rightly directed to return a verdict for the defendant. *Exceptions overruled.*

WILLIAM K. W. HANSON vs. LUDLOW MANUFACTURING
COMPANY.

Hampden. September 26, 1894. — October 18, 1894.

Present: ALLEN, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

*Personal Injuries — Due Care — Master and Servant — Obscure Danger in
Machine — Duty of Master to warn Ignorant Servant.*

The plaintiff, in an action for personal injuries, who was a boy seventeen years old, was sawing boxwood logs into blocks about one inch and a quarter thick, and some of the logs were so large that the saw would not entirely sever them; these logs he took from the table by moving them transversely upon it behind the saw until he could bring them forward, when with a hatchet he detached the partially severed block; a log which he was thus manipulating behind the saw touched it, and was thrown suddenly forward, carrying his hand, which fell upon the saw, and he received the injuries complained of. The evidence tended to show that he had had but little experience in cutting the blocks; and that this method was approved by his foreman. *Held*, that it could not be said, as matter of law, that in using this method the plaintiff was not in the exercise of due care.

While the general danger of contact with a circular saw in operation is obvious, the particular danger arising from the liability of the saw suddenly and forcibly to so throw upward and forward objects which touch it in the rear that they may fall upon the front of the saw is an obscure danger, of which it is the duty of a master to give warning if he has reason to suppose that a servant set at work upon such a saw is ignorant of it; and in an action for personal injuries caused by such movement of the saw it may be a question for the jury whether the servant was so ignorant of this danger that the master ought to have warned him of it.

TORT, for personal injuries sustained by the plaintiff while operating a circular saw in the defendant's employ. Trial in the Superior Court, before *Fessenden, J.*, who, at the defendant's request, ruled that the plaintiff was not entitled to recover, and directed the jury to return a verdict for the defendant;

and the plaintiff alleged exceptions. The facts appear in the opinion.

J. M. Ross, for the plaintiff.

F. H. Gillett & W. W. McClench, for the defendant.

BARKER, J. The particular danger of which the plaintiff contends that he should have been warned arose from the fact that objects which come in contact with the rear of a circular saw when it is in operation may be suddenly and forcibly thrown upward and forward. The saw teeth, which at a given instant are just above the table at the back of the saw, have a rapid upward and forward motion, which tends to carry with them objects which they touch, and such objects may be so thrown as to fall upon the front of the saw. The plaintiff was sawing boxwood logs into blocks about one inch and a quarter thick, and some of the logs were so large that the saw would not entirely sever them. These he took from the table by moving them transversely upon it behind the saw until he could bring them forward, when with a hatchet he detached the partially severed block. A log which he was thus manipulating behind the saw touched it, and was thrown suddenly forward, carrying the plaintiff's hand, which fell upon the saw and was hurt.

While there may have been other and perhaps safer ways of doing his work, the evidence tended to show that he had but little experience in cutting the blocks, and also that this method was approved by his foreman, and we cannot, as matter of law, say that in using it the plaintiff was not in the exercise of due care.

The general danger of contact with a circular saw in operation is of course obvious. But the particular danger by which the plaintiff was hurt is not one which is apparent. The saw teeth move with such velocity that they are indistinguishable. Objects which come in contact with the front of the saw in its ordinary use are not thrown upward, but by its action are held in contact with the table. The fact that objects which touch the opposite side of the saw will be affected in a different manner, and one attended with danger, although easily understood from explanation and readily learned by experience, is not of itself plain and obvious, but is one of those obscure dangers of which an employer should give warning if he has reason to

suppose that a workman who may encounter it in his work does not know of this action of the saw, and is ignorant of this particular danger. The plaintiff was of sufficient age and experience to understand and appreciate all the obvious dangers of his work. He was seventeen years and three months old, had carried sawdust in a Swedish saw-mill when twelve years of age, and was familiar with machinery, having been employed for more than two years in the defendant's mills as a spare hand in the weave-room and otherwise, and for four months he had worked in the room where he was hurt, much of that time sawing boards upon the table on which this saw was, and using it in sawing boards, and he had been sawing the boxwood logs for a day and a half when the accident occurred. But there was no direct evidence that his previous work had required him to move objects back of the saw, or that he had before seen such operations; and he testified that no one had told him of this particular danger, that he did not know of it, and that he was ignorant that if he hit the saw with the log as he moved it on the table behind the saw, the log might be thrown, and his hand thrown off it, and be liable to fall upon the saw. He also said that he did not like to draw the log back of the saw, and that he was afraid of the saw all the time, and afraid he should be hurt. While he could not contend that he did not know that his hand would be injured by contact with the saw, nor that he was engaged in work that he did not know was more than ordinarily dangerous, there was room for the jury to find that he did not voluntarily place his hand upon the saw, and that he was ignorant, and in the exercise of due care and forethought might not have known that the log, if it hit the saw, might carry his hand upon it. If the case had been left to the jury, they might perhaps have well found, from all the evidence, that, notwithstanding his denial, he did know of the action of the saw upon objects touching it in the rear, or that, in the exercise of reasonable diligence, he should have known it. But it cannot be said that there was no other reasonable inference from the evidence, and it was a question for the jury whether the defendant ought to have warned him of this danger.

We do not discuss the question whether a breach of the

defendant's duty to use due care to furnish safe machinery was shown, as the principles of law to be applied upon that branch of the case are well settled, and the evidence at a new trial is not likely to be identical with that now stated.

Exceptions sustained.

JOSEPH SAWYER & others vs. ABRAHAM LEVY & another,
& trustee.

Hampden. September 26, 1894. — October 18, 1894.

Present: ALLEN, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Insolvent Debtor — Assignment to Creditor — Preference.

A preference given by an insolvent debtor to a *bona fide* creditor cannot be avoided by an attaching creditor, whether the form of preference which is adopted is a general assignment for the benefit of such creditors as shall assent thereto, or an assignment for the benefit of certain specified creditors, or an assignment directly to a single creditor.

TRUSTEE PROCESS. Writ dated April 22, 1893. T. L. Haynes, summoned as trustee, answered that at the time of the service of the writ upon him he had certain funds in his hands due the defendants; and that prior to the service of the writ he had received notice that the funds had been assigned to one Aaron Slater, who demanded payment thereof. Slater appeared as claimant of the funds in the hands of the trustee, under the assignment.

At the trial in the Superior Court, before *Mason*, C. J., without a jury, Slater testified that, at the time of making the assignment, the defendants were indebted to him in a large sum; and that the accounts transferred to him by the assignment, including that due from the trustees, being insufficient to secure him for said indebtedness, the defendants, who were doing business in the city of New York, confessed judgment to him for the difference between the amount of their indebtedness and the amount due on the accounts so transferred.

The judgment having been confessed on the same day that

the assignment was made, no general assignment for the benefit of creditors was made by the defendants.

The plaintiffs requested the judge to rule that the assignment was invalid against the attachment made by the plaintiffs upon their writ.

The judge declined to rule as requested; found for the adverse claimant; ordered that the trustee be discharged with costs to both the trustee and the claimant; and found specially that the assignment by the defendants to the claimant was in consideration of a *bona fide* existing debt to the full amount thereof, and, at the time of the assignment, the defendants were in an insolvent condition, and the claimant had knowledge of such condition. The plaintiffs alleged exceptions.

F. H. Gillett & W. W. McClench, for the plaintiffs.

T. M. Brown, for Aaron Slater.

ALLEN, J. The assignment by the defendants to Slater was no doubt a preference, which might be avoided by assignees in insolvency if the defendants were subject to our insolvent laws. Pub. Sts. c. 157, § 96. But no proceedings in insolvency could be taken against them by reason of their non-residence. A preference given by an insolvent debtor to a *bona fide* creditor cannot be avoided by an attaching creditor, whether the form of preference which is adopted is a general assignment for the benefit of such creditors as should assent thereto, or an assignment for the benefit of certain specified creditors, or an assignment directly to a single creditor. Otherwise, it would simply amount to giving a preference to the attaching creditor, instead of to the creditor or creditors selected by the debtor. This has often been adjudged. *National Mechanics & Traders' Bank v. Eagle Sugar Refinery*, 109 Mass. 38. *Banfield v. Whipple*, 14 Allen, 13. *Train v. Kendall*, 137 Mass. 366. *First National Bank of Easton v. Smith*, 133 Mass. 26.

Exceptions overruled.

BENJAMIN F. COFFIN vs. INHABITANTS OF PALMER.

Hampden. September 25, 1894. — October 18, 1894.

Present: ALLEN, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Defective Highway — Notice of Place — Due Care.

A notice to a town that a person has been injured by a defect in the sidewalk of a street at a point "just northerly of the northerly side of the entrance to the passenger station" of a railroad company, sufficiently designates the place of the injury, under Pub. Sts. c. 52, § 19, if, in an action for such injury, it appears that the sidewalk was constructed on the easterly side of the street under a railroad bridge, through the easterly abutment of which an entrance led up to a station above, and the evidence tends to show that the injury occurred a little way from the entrance, and not more than fifteen or twenty feet northerly of it.

In an action against a town for personal injuries occasioned to the plaintiff by falling, after dark on a snowy night, upon a hump of ice on the sidewalk of a frequented street which is constructed under a railroad bridge, having an entrance therefrom to a passenger station above, although he knew of the existence of the ice, having noticed it earlier in the day, and was not thinking of it at the time when he fell, if he testifies that he was going cautiously because it was slippery, and that he went along as cautiously as he could, and it appears that the sidewalk was in common use, and that another person was using it at the time of the accident, the question whether the plaintiff was exercising due care is for the jury.

TORT, for personal injuries occasioned to the plaintiff by an alleged defect in Commercial Street, in the defendant town. Trial in the Superior Court, before *Richardson, J.*, who allowed a bill of exceptions, in substance as follows.

It appeared in evidence that Commercial Street ran southerly from Main Street under the track of the Boston and Albany Railroad, the distance from Main Street to the bridge over the railroad track being about eleven rods; that a sidewalk, the surface of which was concreted, had been constructed from the southerly side of Main Street along the easterly side of Commercial Street, to and under the bridge, to the southerly side thereof; that there was an iron railing extending the entire distance under the bridge on the edge of the sidewalk towards the street, for the protection of travellers upon the sidewalk; and that through an opening in the easterly abutment supporting the bridge a passageway about twelve feet wide, provided

with stone steps, led up to the passenger station of the railroad company, the northerly side of the passageway being about forty-seven feet from the northerly side of the bridge.

It was conceded that Commercial Street was one which the defendant was bound to keep in repair. It was shown by the plaintiff that, within the time required by law, a notice was served on the defendant, stating the time when the injury was received, and giving as the cause the icy and slippery condition of the walk, and as the place a point on the walk "just northerly of the northerly side of the entrance to the passenger station" of the railroad company.

The plaintiff testified that he was sixty-eight years old, and had lived in the defendant town about twenty-two years; that he lived on Commercial Street, about one thousand yards southerly from the railroad bridge; that the accident occurred under the bridge, on February 25, 1893, between six and seven o'clock in the evening; that he was going home, and "it was a snowy night"; that he was carrying three parcels; that as he went under the bridge he met another man; that, just as he passed • him, the plaintiff "stepped over a bulge of ice," and fell upon the sidewalk, receiving the injuries complained of; that there were people passing backwards and forwards after he fell; that he had seen the condition of the walk previously to that time; that the bulge seemed to be like a half icicle, a foot and a half or two feet wide with a bulge in the centre from five to seven inches high; that there had been a bulge of that kind in the sidewalk there a number of days; that it was dark, except that there was a lamp kept at the end of the passageway leading up to the station, which reflected a little light; that the snow was blowing down a little through the passageway; that he did not know exactly where this ice was, but he should say that "it was a little inclined to be toward Main Street, between the bridge and Main Street"; and that he should say it might be fifteen feet or it might be twenty feet from the northerly end of the abutment.

On cross-examination, the plaintiff testified, among other things, as follows: "I knew that there had been ice there. There had been ice there that day and previous to that day. I think I did n't notice it when I went up. I saw it there in the

forenoon, the day I was hurt, in the daylight. I turned out for it and went near the railing. By going near the railing, I could not escape the ice ; it extended clear across. I held on to the railing to keep my feet from going out from under me. It seemed to be dangerous. I had escaped danger there in that way more than once. I always, when I came up and down, put my hand on the railing. I had escaped the danger of this particular piece of ice a number of times by taking hold of the railing. My taking hold of the railing on other occasions besides that morning had no reference to this piece of ice in particular, but it was slippery quite a long ways. I did it all the way to guard against accident. . . . I was going along, and had no thoughts of falling. I did n't have any idea there was any obstruction that would throw me, because I was n't thinking about it. It was dark, and I went along as cautiously as I could. I did n't think about falling at all. I was going cautiously, because it was slippery. I knew that it was slippery. This did not lead me to recall the fact. I did not think of it till I fell. I thought it was slippery all along the sidewalk. I could n't take hold of the railing with my hands full. This is not the reason ; I probably should n't have done so. I was n't thinking about slipping down."

Edward Goodes, a witness in behalf of the plaintiff, testified that he went over the sidewalk under the bridge the morning after the accident and saw a bar or ridge of ice on the sidewalk extending from the abutment, about two or three feet from the passageway going toward Main Street, nearly across the sidewalk, and being at the highest point near the abutment some ten or twelve inches above the level of the sidewalk ; and that the bar of ice was not more than two or three feet northerly from the northerly side of the passageway leading to and from the station.

George E. Davis, a witness for the plaintiff, testified to the existence of a formation of ice some three or four inches thick, and covering a space on the sidewalk from three to four feet in diameter, located just at the northerly side of the bridge, but whether this existed at the time of the accident he was not able to state.

William Holbrook, a witness for the defendant, testified that he was the town's physician ; that on March 4, following the accident, he was sent by the selectmen to examine the plaintiff ;

and that the plaintiff then told him that the ridge of ice upon which he fell was on the sidewalk "just at the point where the same is intersected by the northerly side of the passageway leading from the station, just as you turn from the passageway to go towards Main Street."

Frank W. Taylor, a witness for the plaintiff, testified that he met the plaintiff just before the accident; and that he was ten or fifteen feet beyond him when he heard him fall, and turned around and saw him sitting on the sidewalk. On cross-examination, he testified that the ridge of ice was about half-way from the point where persons go up stairs to the railroad station and the end of the bridge towards the street.

There was no claim that there was more than one ridge or bulging piece of ice on the walk under the bridge.

It was in evidence that the carriageway which ran along next to the sidewalk was at the time of the injury open and in a passable condition, and led directly from Main Street past the plaintiff's house.

At the close of the evidence, the defendant requested the judge to rule as follows:

"1. If the plaintiff knew of the existence of the defect at the time of the injury, and before he came in contact with it, and exercised no care or caution to prevent the injury, he is not entitled to recover. 2. If the plaintiff knew of the existence of the defect, but at the time of the injury had forgotten it, and made no attempt to avoid it and avoid injury, he is not entitled to recover. 3. No sufficient notice of the time, place, and cause of the injury was given to the defendant. 4. There is no evidence for the jury that the plaintiff was in the exercise of due care. 5. Upon all the evidence, the plaintiff is not entitled to recover."

The judge refused to give the last three rulings requested, but gave the first and second in the following form: "If the plaintiff knew of the existence of the dangerous piece of ice on the sidewalk at the time he attempted to pass over it, and exercised no care or caution to avoid damage and injury upon it, he is not entitled to recover. If the plaintiff, at the time of the injury, knew of the existence of the alleged dangerous defect, but at the time of the injury had forgotten it, gave no thought to it, used no care to avoid it and made no attempt to avoid it and avoid injury, he is not entitled to recover."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

C. L. Gardner, for the defendant.

S. S. Taft & J. B. Carroll, for the plaintiff.

BARKER, J. 1. In our opinion the notice was good. It indicated clearly that the place where the injury was received was upon the easterly sidewalk under a certain railroad bridge, and said that it was at a point on the walk just northerly of the northerly side of a certain side entrance, leading to a railway station above; and the evidence tended to show that the place of injury was a little way from, and not more than fifteen or twenty feet northerly of the entrance.

2. The question of the plaintiff's care was for the jury. Although he knew of the danger from the ridge of ice, and was not thinking of it at the time when he fell, and although he might have taken the roadway instead of the sidewalk, there were other dangers arising from snow, from other icy places, and from darkness, and he testified that he was going cautiously because it was slippery, and that he went along as cautiously as he could; and it also appeared that the sidewalk was in common use, and that another person was using it at the time of the accident.

Exceptions overruled.

MARY MORAN vs. INHABITANTS OF PALMER.

Hampden. September 26, 1894. — October 18, 1894.

Present: ALLEN, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Defect in Highway — Travelled Way — Instructions.

A side of a street may be in such form, and so used, with the knowledge and acquiescence of a town, as to be a portion of the travelled part of the way which the town is bound to keep in repair, even though no work has been done upon it to fit it for the use of pedestrians.

At the trial of an action against a town for injuries alleged to have been caused by a defect in a highway, the judge instructed the jury that the plaintiff could not recover unless the defect was "within the travelled way," and in explanation added the words "that is to say, so connected with it and so used for travel that

it may fairly be said to be within the limits of the way, and in such a way as to make the travel upon it unsafe by reason of the want of repair so existing." Held, that the instructions were correct.

TORT, for personal injuries occasioned to the plaintiff by reason of an alleged defect in a highway which the defendant town was bound to keep in repair. At the trial in the Superior Court, before *Fessenden, J.*, the jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

C. L. Gardner, for the defendant.

J. B. Carroll & W. H. McClintock, for the plaintiff.

KNOWLTON, J. The exceptions in this case are to the refusal of the court to give the instructions requested, which were as follows: "1. Upon all the evidence, the plaintiff is not entitled to recover. 2. If the jury find that the stone was neither within the limits of the travelled carriageway nor the footpath, the plaintiff is not entitled to recover. 3. If the jury find that the stone was not within the limits of the footpath, the plaintiff is not entitled to recover."

The way upon which the plaintiff fell, at about seven o'clock in the evening, when it was somewhat dark, was a street in the village of Thorndike, in the defendant town, and the stone which was alleged to be a defect was in or near a footpath worn by the public travel on one side of the street. No sidewalks had ever been wrought for pedestrians, but about twelve feet in width of the central portion of the street had been graded for travel with teams. The defendant's first contention is, that the plaintiff cannot recover because she was walking in a part of the street which had never been prepared for use by travellers. On this part of the case the jury were instructed that the plaintiff could not recover unless she was walking in the travelled part of the street, and were directed to determine, in view of the situation of the street, and the amount of travel that passed over it, and the kind of use which was made of it, whether the path at the side of the street was used for public travel with the knowledge and acquiescence of the town. Under the instructions of the court, the jury must have found that the side of the street, although never actually wrought as a sidewalk, was used, and permitted and intended by the town to be used, by persons on foot, as a portion of the travelled part of the way. We are

of opinion that these instructions were correct. A side of a street may be in such form, and so used, with the knowledge and acquiescence of a town, as to be a portion of the travelled part of the way, which the town is bound to keep in repair, even though no work has been done upon it to fit it for the use of pedestrians. *Lowe v. Clinton*, 136 Mass. 24. *Aston v. Newton*, 134 Mass. 507.

The second and third requests were sufficiently covered by the instructions given. The jury were told that the plaintiff could not recover unless the defect was "within the travelled way." In explanation of the expression "within the travelled way," the judge added the words, "that is to say, so connected with it, and so used for travel, that it may fairly be said to be within the limits of the way, and in such a way as to make the travel upon it unsafe by reason of the want of repair so existing," etc. This was in accordance with prior decisions. *Warner v. Holyoke*, 112 Mass. 362. *Dowd v. Chicopee*, 116 Mass. 93. *Exceptions overruled.*

GEORGE BROUILLETTE vs. CONNECTICUT RIVER RAILROAD COMPANY.

Hampden. September 26, 1894. — October 18, 1894.

Present: ALLEN, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Railroad — Employers' Liability Act — Law and Fact — Evidence.

A wire, which is a part of the electric signal system of a railroad, used to connect the joints of the rails so as to insure the transmission of the electrical current, affixed to the rail at either end by a bolt, and running along the rail until it reaches a sleeper, then running out on the sleeper in a loop, and fastened at the end and each corner of the loop by staples, is a part of the "ways, works, or machinery" of the railroad, within St. 1887, c. 270, § 1, cl. 1.

In an action against a railroad corporation for personal injuries occasioned to the plaintiff while in its employ, it appeared that he was tripped by a wire, which was used as a part of the electric signal system of the railroad to connect the joints of the rails, and which projected above the rail, and was run over by a train while, in the course of his employment, crossing the tracks upon which trains were passing in opposite directions. The evidence was conflicting as to the nature of his employment, his evidence tending to show that he was em-

ployed as a brakeman during a portion of the day, and that at other times he assisted in repairing the electrical apparatus; and the defendant's evidence tending to show that he had charge of its electric system. The evidence was conflicting also upon the question whether it was necessary for him to use the tracks as he did, and upon other questions. *Held*, that it was error to rule, as matter of law, that the action could not be maintained; and that the case should have been submitted to the jury.

Evidence that a person in the employ of a railroad corporation has boasted of his ability to keep out of the way of trains and not get hurt, is admissible in an action by him against the corporation for personal injuries occasioned by being run over by a train while, in the course of his employment, crossing the tracks upon which trains were passing in opposite directions.

TORT, under the employers' liability act, St. 1887, c. 270, for personal injuries occasioned to the plaintiff while in the defendant's employ. Trial in the Superior Court, before *Maynard, J.*, who allowed a bill of exceptions, in substance as follows.

The plaintiff testified that he was employed by the defendant as a spare passenger brakeman, so called; that it was his regular duty to act as brakeman on the 6.20 A. M. train from Holyoke to Springfield, then to take the 6.50 A. M. train from Springfield to Brightwood as conductor, and bring it back to the Springfield yard without passengers, arriving there about 7.05 A. M.; that again it was his regular duty, at 5.45 P. M., to act as brakeman on a train from Springfield to Holyoke, which was his last regular duty of the day; and that between 7.05 o'clock A. M. and 5.45 o'clock P. M. he held himself subject to the orders of one Ray, who used to be called the head conductor, and who had charge of all the brakemen, conductors, and baggage-masters, and to whom the plaintiff was in the habit of reporting regularly.

On cross-examination, the plaintiff testified as follows: "I went to work for the Connecticut River Railroad Company in August, 1885, working in the yard at Holyoke, switching. I stayed there until January 10, 1886, then I went to work as a passenger brakeman with Conductor Miller, to learn to run. I worked on that train for about a week or a week and a half; then I went to work on the head end of the mail train for about a week, and then went on the hind end of the mail train to Windsor, Vermont, for a few days. I continued to be brakeman every day until I was injured. At the time of my injury I came down with Mr. French on the 6.20 train out of Holyoke; then I ran the 6.50 train to Brightwood, which is two miles and

a fraction from Springfield ; then I used to go into the office and wait for orders. I did not brake after that until 5.45 at night. I used to help the conductor on the 5.45 train ; the brakeman had to help the conductor take tickets ; the train went to Northampton, I got off at Holyoke. I got back from Brightwood in the morning at 7.05 ; between 7.05 in the morning and 5.45 at night what I did depended upon what Mr. Ray gave me orders to do. If there was a brakeman off, he would send me on to take his place. I never made any record of the number of times I went out as brakeman after 7.05 and before the 5.45 train in the month previous to my accident. My main business was not tending the electric signals ; I did not have charge of all the work that was done on the electric signals ; Mr. Ray had charge. I have seen him work at Holyoke and at Springfield on the electric signals this very same year. I have seen him work at Holyoke a good many times ; if he didn't find anybody, he used to go himself. I was not sent to put the wires on the rails all the way from Springfield to Northampton ; the head man put the wires on the rails. Dennis Sullivan was the head man ; Sullivan did not work under me ; he was sent to work with me. I do not know who put the wires in at the point where I was hurt. I did not put the wires in ; I never had any occasion to repair any of the wires in that spot ; I have in other spots ; if the signal was wrong, caused by a broken wire, I used to put them in sometimes, — not very often ; sometimes a week and sometimes two or three weeks would elapse during which I would not go over the tracks on foot."

On re-direct examination, he testified as follows : " I wore a uniform of plain blue cloth, with buttons on the cap, and a badge on the cap ; on the badge it said, ' Brakeman, Connecticut River ' ; I wore that right along ; my wages were \$1.75 a day and my regular day was from 6.50 in the morning, when I started for Brightwood. Mr. Ray told me that if I would come down with Mr. French every morning and help him he would allow me a quarter of a day extra ; when I came down on the 6.20 train they gave the extra quarter of a day, and when I did not come down on the 6.20 they did not give it to me. They had on the Connecticut River Railroad at that time what is known as regular brakemen and spare brakemen ; I was a spare brakeman ;

they have spare brakemen, because sometimes a man might be taken sick and they have got to have a man to take his place. I was for many months and years the only spare brakeman they had ; sometimes, in the summer time, they used to have two or three, — two were the most I ever saw. In the discharge of my duties, I had nothing to do with examining or looking over the tracks or these electric appliances.”

The evidence for the plaintiff further tended to show that, on the Saturday previous to the accident, which happened on Monday, December 5, 1892, the plaintiff had received orders from Ray to move a certain signal near the Plainfield Street bridge, so called, about three fourths of a mile north of the scene of the accident. The plaintiff and one Sullivan had worked on this matter all day Saturday, and had not finished it. On Monday morning, after returning from Brightwood and leaving the train in the Springfield yard, the plaintiff went down to the pay car, which was standing on a track running into the roundhouse, some distance south of the scene of the accident. The plaintiff received his pay and went from the pay car to the carpenter shop to get a board to finish the work of moving the signal. He then went back to the pay car to hurry up Sullivan, who was again working with him. The plaintiff and Sullivan then started from the pay car and went north between the mail track and the down main track, so called, the mail track being the one directly west of the down main track. They walked side by side until they reached the south end of the paint shop, where the plaintiff crossed over the down main track and continued along north in the clear space between the two main tracks, Sullivan walking between the rails of the down main track. The distance between the two main tracks from rail to rail was from six and a half feet to six feet and eleven inches. With two passenger trains going in opposite directions, there was not room enough to stand between them. The plaintiff and Sullivan had got about opposite the middle part of the paint shop, where there was a “two-throw” switch between the westerly rail of the track and the paint shop, when Sullivan crossed over to the space between the paint shop and the west track, and the plaintiff, looking ahead, noticed a passenger train in motion to back down on the east or up main track. It started from the north

side of the entrance to Hampden Park ; the engine was on the north end of the train, and there were two or three cars attached to it ; and above the engine the atmosphere was smoky. The plaintiff continued along until he had gone about two thirds of the length of the paint shop, that is, up to another switch also between the westerly rail of the down main track and the paint shop, when he turned round and saw a train about two hundred or two hundred and twenty-five feet away, backing up on the down main track. The train was coming from the depot, and was going at the rate of about ten miles an hour. When the plaintiff looked back, the rear end of the other train, which was backing into the depot on the up main track, was right over the bridge at the entrance to Hampden Park. The plaintiff looked at his watch and started to go across and get out of the way, so as not to get caught between the two trains. As he went across, he noticed a banjo signal, so called, on the west of the down main track and just south of the Hampden Park bridge, showing a white face with a dark centre in the middle, which showed that there was a train coming upon that track from the north and in the same block with the signal. As the plaintiff was crossing the down main track to get out of the way of the trains, his foot caught upon a wire and he fell down, and, though he tried to get his foot off, he was held by the wire in such a position that the train, backing out of the depot on the down main track, ran over his foot, necessitating amputation. The wire upon which the plaintiff caught his foot was part of an electric signal system used by the defendant at particular points on its road, the wire being placed at each point in the track where the ends of two rails meet, the object of the wire being to make sure that the current of electricity will be carried, even though the strap iron which is ordinarily used in fastening the rails together should become rusty. The wire was a piece of ordinary galvanized wire, about three sixteenths of an inch in diameter, either end being affixed to the web of either rail by a bolt of some description. The wire ran along the web of the rail until the tie or sleeper was reached, when it ran out on the tie or sleeper in a U-shaped loop, which was fastened by staples at the extreme point and at each of the other two ends of the loop upon the tie. The wire upon which the plaintiff

tripped stood up in the air two or three inches above the rail. Another workman in the employ of the defendant had noticed it in the latter part of November, when it stood up from the tie; it was not fastened, had no staple in it, and it was substantially in the same condition on the day when the plaintiff got hurt, except that it stood up higher. The wire was inside of the west rail of the down main track, and was from seven to fifteen feet south of the Hampden Park bridge. The train which struck the plaintiff was the "Owl" train, so called, which was due in the Springfield depot at 7.25 A. M.

The plaintiff further testified that he knew the times when trains were due; that when trains run into the station at Springfield they have to back out into the yard; that he had "braked" on a train that was accustomed to back out into the yard, — the train that leaves at 8.10 P. M. out of Springfield to go to Windsor, Vermont, and back at 7.25 in the morning; that he was brakeman occasionally on that train; that that was the train which ran over him; that the tracks east of the main tracks were switch tracks for freight trains; that the freight trains are constantly moving about there, switching; that when he went out there he knew a train was due from the north; that he knew that the regular trains were liable to come at any time, and freight cars were liable to be switched on the side tracks; that the trains on the main track might be expected to arrive on time; that when they came out of the depot and were going beyond the side tracks up as far as the paint shop, he had seen them back up on the up main track, the track which the cars would go on naturally as they were going north; that he had seen the "Owl" train back out on the east track, and he had backed them himself on the east track; that he would cross over from the depot on the east track, then go up north of the bridge, then switch back on the west track, and then kick the cars on that track; and that he had done that a hundred times when he was on the train.

The plaintiff was asked, upon cross-examination, if there was anything to hinder his going upon the street, and replied that there was a stone wall and a fence three and a half or four feet high at the east side of the railroad, next to the highway.

The evidence for the defendant tended to show that the plain-

tiff had charge of the electrical system of the defendant, which consisted of eight miles of electrical apparatus, spread over fifty miles of railroad; that, upon the morning of the accident, the plaintiff was seen walking north on the track by the paint shop; that there was a brakeman on the rear end of the train which struck the plaintiff, who hallooed to warn the plaintiff of his danger; that the plaintiff appeared to look around the last time the brakeman hallooed; that when the plaintiff left the pay car he passed by the train which afterwards ran over him; that the train was then standing still on the down main track near the pay car, and some of the men on the train spoke to the plaintiff; that at the time of the accident the train which struck the plaintiff was being kicked on to a side track, which left the main track a little north of the Hampden Park bridge, in the ordinary course of the defendant's business; that at the time when the plaintiff was struck the train was going six or seven miles an hour; that the ends of the two trains passed each other at the southerly end of the paint shop; and that the wires at the joint on the bridge, and at the joint next south, were laid flat along the rail at the time of the accident.

The rear end brakeman of the train that struck the plaintiff, called as a witness by the defendant, testified that he asked the plaintiff, immediately after the accident, if he did not hear him hallooing, and the plaintiff said, "Yes, but I thought it was the other train"; that the plaintiff was excited at the time; that the witness told the plaintiff that he had done all he could for him; and that the plaintiff swore at him, and said he had not.

One Higgins, a witness for the defendant, testified that, on the morning of the accident, he was standing right north of the bridge, waiting for this train to back from the depot, and was looking out for the train that was coming down from Holyoke at the same time, to flag it; and that he did flag the train, and it stopped.

Evidence was also admitted, against the plaintiff's objection, tending to show that the plaintiff had, on several occasions, boasted about his ability to keep out of the way of trains and not get hurt; and the plaintiff excepted.

The treasurer of the defendant corporation testified that the plaintiff had signed his name to the pay-roll under the heading

"Machinist," from December, 1887, to December, 1892; that he received \$1.75 a day; that the pay-rolls were made out before they were signed; that in no place on the pay-roll was the plaintiff distinguished as an electrical machinist or electrical engineer, or anything of that kind; that the wages of machinists were from \$4.00 to \$1.35 a day, and that the average wages of a machinist who had learned his trade were \$2.25 and the average wages of brakemen \$1.75 a day.

The plaintiff, called in rebuttal, testified that it was no part of his duty to examine the wires in question, or to see whether or not they were securely fastened; and that he never did it.

He denied the conversations about his ability to escape trains, and he also denied that he had passed the train that struck him while it was standing still, and that he had talked with any of the men on the train.

At the close of the evidence, the judge, at the request of the defendant, ruled that, upon the whole evidence, the plaintiff was not entitled to recover; and directed the jury to return a verdict for the defendant. The plaintiff alleged exceptions.

J. B. Carroll, for the plaintiff.

F. P. Goulding, for the defendant.

ALLEN, J. There is no doubt that the wires were a part of the ways, works, and machinery of the defendant. The grounds chiefly relied on by the defendant for sustaining the ruling made at the trial are, that, on the evidence, the plaintiff himself was charged with the duty of keeping the electric system in repair; that, if there was any fault with the wires, it was in part at least owing to his own negligence; that there was no evidence showing a violation of any duty which the defendant owed to the plaintiff, even if the wire was out of place; that it was not necessary that he, on his way to his work, should pass up through the yard, or at any rate that he should walk between the two main tracks; that in crossing the track he was not in any place where he was expected to be, in the performance of his duty; that the defendant was not bound to keep the track in such a condition that it would be safe and convenient for him to cross at that place; and that it is not reasonable to hold that the defendant's supervision of repairs on the road-bed should extend to such details.

It seems to us that the plaintiff was entitled to go to the jury upon all of these questions. They all involved matters of fact, upon which the evidence was not so clear and undisputed as to enable a judge to dispose of the case as a matter of law.

The evidence of previous boasts by the plaintiff as to his ability to keep out of the way of trains and not get hurt was competent, as bearing upon the question of his carefulness or readiness to take risks.

Exceptions sustained.

COMMONWEALTH vs. JOHN P. CLUNE & another.

Hampden. September 26, 1894. — October 18, 1894.

Present: ALLEN, MORTON, LATHROP, & BARKER, JJ.

Indictment — Grand Jury — Principal and Accessory — Witness.

If an indictment has been quashed, it is not necessary for the grand jury to examine the witnesses anew before finding a second indictment against the same person for the same offence; and the facts that some of the grand jurors who found the original indictment were absent when the second indictment was found, and that others were present when the second indictment was found who were absent on the former occasion, do not render the indictment invalid.

A. prepared a forged check and delivered it to B. on the street, asking the latter to get a messenger boy to take it to the bank on which it was drawn and get it cashed. B. walked up the street until he found a boy, and then down the street until he was nearly opposite the bank, when he sent the boy with the check into the bank for the money. The boy obtained the money and gave it to B., who went into a store and got a bill changed and paid the boy for his services, and when B. came out of the store A. was coming across the street to where B. was, and upon reaching him asked him if he had got the money, and received it from him less the sum paid the boy. *Held*, that A. could be convicted of uttering the check.

It is not error, in a criminal case, to refuse to instruct the jury that it would not be safe to convict the defendant upon the testimony of an accomplice, unless corroborated in a material point, or that such testimony should be scrutinized with great care and caution.

There is no rule of law that, if a witness in a case has sworn falsely in one particular, it is unsafe for the jury to rely on any part of his testimony, or upon any uncorroborated statement by him; but the credibility of a witness is for the jury.

INDICTMENT against John P. Clune and James Malley, found at the September term, 1893, of the Superior Court, for uttering a certain forged instrument, on December 22, 1892, at Springfield.

Trial in the Superior Court, before *Dewey, J.*, who allowed a bill of exceptions, in substance as follows.

An indictment for the same offence was found against Clune and Malley at the May term, 1893, of the Superior Court. Both indictments were found by the grand jury drawn, summoned, and impanelled for the year 1893. The indictment found at the May term was quashed, upon motion of Clune.

On the indictment found at the September term, Clune and Malley were duly arraigned, and before the jury were impanelled Clune filed a plea in abatement, upon the following grounds: "1. Because said indictment was found and returned without any legal evidence having been presented to or heard by the grand jury who found and returned said indictment. 2. Because said indictment was found and returned by said grand jury without any evidence having been presented to or heard by them with reference to the offence in said indictment alleged. 3. Because no witnesses were heard by said grand jury with reference to the charge in said indictment set forth."

At the hearing upon the plea, Clune offered to prove that at the September term, when the indictment was found, no witnesses appeared before the grand jury, and no evidence was then introduced; that certain grand jurors, who were present at the May term and heard the evidence then presented upon which the indictment was found at that term, were not present at the September term; and that certain grand jurors were present at the September term who were not present at the May term, when the evidence relating to said offence was introduced. The government objected to the introduction of this evidence. The judge refused to hear the evidence, and to quash the indictment; and Clune excepted.

At the September term, Clune and Malley were duly tried on the indictment found at that term, the jury returning a verdict of guilty as to Malley, and disagreeing as to Clune, and at the May term, 1894, Clune was again placed on trial.

The government offered evidence tending to show that on December 22, 1892, Clune went into the tax collector's office in the City Hall, in Springfield, and there took from a desk, upon which were blank checks on the different banks of the city, as well as blank notes and pieces of paper, something

which the tax collector believed to be one of the blanks; that about one hour later on the same day he met the city messenger outside and in the rear of the City Hall, and asked permission of him to use his desk and paper for the purpose, as alleged by Clune, of writing a note or bill against a person who owed him; that permission was accorded him, and he went into the city messenger's office in the City Hall, located on the opposite side of the corridor from the tax collector's office, but nearer the front of the building, and wrote at the desk in that office for about three minutes; that, still later in the day, as testified by Malley, Clune went to Malley and handed him, at or near a billiard saloon on Main Street, in Springfield, (Malley being uncertain as to the precise place,) an envelope sealed and addressed to the teller of the Chicopee National Bank in that city, and asked Malley to get a messenger boy to take it to the bank and get it cashed; that Malley went into the billiard saloon and then went up Main Street to the north until opposite a certain dry goods store, where he saw a messenger boy, whom he asked to do an errand for him; that Malley and the boy then walked down Main Street, Malley behind the boy, (the boy testifying that Malley asked him to walk some twenty feet ahead of him,) until they got nearly opposite the Chicopee National Bank, and Malley then gave the boy the envelope which he had received from Clune, telling the boy to go across the street and present the envelope to the teller of the bank, and that he would probably receive some money, and, when he came out, to meet Malley in the hallway next to a drug store, which was across the street from and nearly opposite the bank; that, in pursuance of this request, the boy went to the bank, presented the envelope to the teller, who unsealed the same and drew therefrom the check or order, which was set out in the indictment, and also a letter accompanying the same, requesting the teller to pay the bearer the amount of the check, and purporting to be signed by the drawer of the check; that the teller handed the boy the sum of fifty dollars, and the latter immediately crossed the street to where Malley was standing in said hallway, handed Malley the fifty dollars, and went with him into the drug store, where Malley got one of the bills changed and paid the boy twenty-five cents for his services; and that the boy then passed out and did not at any time see Clune.

Malley testified that, when he came out of the drug store, where he remained some five minutes talking with the clerk, he saw Clune coming diagonally across the street from Court Square, which was the first he had seen of him since receiving the envelope; and that Clune passed over to where Malley was and asked him if he had got the money, and there received the money, less the twenty-five cents paid the messenger boy.

Malley testified in behalf of the Commonwealth, and had not been sentenced since his conviction by the jury, as above stated. Malley further testified that, some time after the delivery of the money by him to Clune, the latter, on the same afternoon, gave back to him some part of it; and that later he and Clune went to Hartford, Connecticut, together. Clune admitted going to Hartford, but denied being in the company of Malley. Both returned to Springfield the same evening. A plan of the location may be referred to.

The defendant Clune requested the judge to instruct the jury as follows:

"1. Upon the evidence and indictment in the case, the defendant should be acquitted.

"2. If the order described in this indictment was a false, forged, or counterfeit order, and if Clune merely handed or gave the same to Malley for the purpose of having Malley obtain the money upon the same for Clune, and if Malley knew or had reason to know that the order was false, forged, or counterfeit, and if Malley obtained the money upon the same, then Malley was the utterer or publisher of the order within the meaning of the law, and Clune was but an accessory before the fact, and cannot be convicted under this indictment.

"3. If the order was a false, forged, or counterfeit order, and if Clune, knowing its character, handed the same to Malley and told Malley to get a messenger boy and get the money on the same, and Malley, knowing or having reasonable cause to know that the order was false, forged, or counterfeit, gave the same to the messenger boy, who obtained from the bank the money on the same, and gave the money to Malley, who in turn found Clune and gave the same to him, then Clune cannot be convicted upon this indictment.

"4. The defendants are improperly joined in this indictment, and Clune cannot be convicted thereon.

"5. Malley is an accomplice, and it would not be safe to convict Clune upon his testimony, unless corroborated in a material point.

"6. If Malley was an accomplice of Clune in the forging or uttering of the order, his testimony should be scrutinized by the jury with great care and caution.

"7. If, in any material point, Malley has wilfully and designedly sworn falsely, it would be unsafe to rely upon any part of his testimony; for if in any particular it was ascertained that material testimony was designedly false, the jury would have no sufficient security that the same might not be true of every other portion of his testimony.

"8. It is unsafe for the jury to rely upon any uncorroborated statement of a witness who in any one thing has knowingly and wilfully testified falsely."

The judge refused to give the instructions requested, and, among other things, instructed the jury as follows:

"If the order was a false, forged, or counterfeit order, and if Clune gave the same to Malley for the purpose of having Malley obtain money on the same for Clune, and if Clune was not present aiding and encouraging Malley in the uttering of the check, and if Malley knew, or had reason to know, that the order was false, forged, or counterfeit, and if Malley obtained the money on the same, then Malley was the utterer or publisher of the order within the meaning of the law, and Clune was the accessory before the fact, and cannot be convicted on the indictment. If the order was a false, forged, or counterfeit order, and Clune, knowing it, handed the same to Malley and told Malley to get a messenger boy and get the money on the same, and Malley, knowing or having reasonable cause to know that the order was forged or counterfeit, gave the same to the messenger boy to obtain at the bank the money on the same, and he gave the money to Malley, who in turn found Clune and gave the same to him, and Clune was not present aiding or encouraging Malley at the uttering of the order, then Clune cannot be convicted on this indictment. . . .

"Assuming that Malley got this check from Clune, and got

money on it substantially in the way the government claims, he would be an utterer of the check. As I have already said, it is an offence which more than one may be concerned in, and the government claims that Clune is concerned in it, and so concerned as to be a principal. He is so indicted. He says, while he contends he had nothing to do with it, if he had anything, upon the evidence, the whole evidence, as presented before you, he must be deemed an accessory, not a principal. So it is important for you to have clearly in mind the distinction between an accessory and a principal, and that is what is intended to be set out in these requests. A principal is one who in the meaning of the law is present and abetting, assisting, and encouraging the performance, the perpetrating of the crime. An accessory before the fact is one who, not being present to aid, abet, assist, and encourage, has beforehand procured or taken other steps to have the crime perpetrated. . . .

“It must, therefore, be proved that the abettor was in a situation in which he might render his assistance in some manner to the commission of the offence. It must be proved that he was in such a situation by agreement with the perpetrator of the crime, or with his previous knowledge, consenting to the crime, and with the purpose of rendering aid and encouragement in the commission of it. . . .

“Take the evidence in this case. Suppose the government satisfied you on Clune and Malley having had some transaction about a previous check. Later Clune brought this check, with the note and the envelope addressed, and gave it to Malley, and gave Malley instructions in regard to the messenger boy, and told him about going to the bank and getting this money. What were their relations to each other? What was the understanding between them? Where was Clune in reference to Malley? Was he in the neighborhood? Was he near by when the money was brought from the bank? Was he near by for the purpose of giving encouragement and counsel, so as to assist him in case any sudden inquiry should be made from the bank, or did he simply, if at all, procure this check, and write the note, and give the envelope with the contents to Malley, with the direction to go and get the money and stay somewhere else, he himself absent so far off as not to be present within the sense

and fair meaning of this rule of law? . . . It does not depend necessarily upon any given number of feet, or upon any given number of rods. It may depend somewhat upon the nature of the crime. Suppose men were committing a burglary or a robbery of a bank, they might have half a dozen accomplices stationed around. Some might be at a very considerable distance, but there for the purpose of giving an alarm if anything happened, and within such a distance that by some signal arranged they might give the alarm to warn their confederates if somebody was stirring, then they might be found present within the meaning of the law, although not physically present, because present in the sense that they were located there for the purpose of giving warning or other assistance, if necessary, and at such a point that they could give warning.

"So, here, in dealing with this part of the case, you have to consider the evidence, what took place between Clune and Malley, what their understanding was, where they went, and how they conducted themselves, where Clune was, and with what purpose; and it becomes a matter of fact for you to determine, having these distinctions in mind, whether, if he is connected with it, it is in such a way as to be a principal or an accessory before the fact. If the latter, he could not be convicted under this indictment. They are separate offences, as much as burglary and robbery. . . .

"There is something to be said about one or two matters of evidence. One is the testimony of Malley. He is a competent witness. You have heard his history, you have heard the statement as to his having been convicted and imprisoned, you have heard his statement as to his connection with this case, you have the facts before you that he has been tried and found guilty of this offence, that there has been a motion for a new trial in his case which has not been disposed of, and you have heard the suggestion that he might be influenced in his testimony by some possible advantage which he expects may accrue to himself by testifying. There is no evidence of any agreement between him and any prosecuting officer as to any indulgences or considerations for his testimony. I believe he was asked, and testified there was not. But take it all in all, in the light of all you have learned of him in the case, it is for you to deter-

mine the degree of credibility you will give to his testimony. If you believe, if it seems to you reasonable to believe, he is influenced in his testimony by any supposed advantage he may get from it, you have the right to take that into account. That is, it may be conceived as a possible thing that he may expect to get an advantage to himself in testifying, and thereby his testimony may be affected when he would not get anything, and there has been no arrangement to favor him or purpose to favor him. It is one of the things pertaining to our common human nature, in such a way that you have the right to take into account, in judging his testimony, that matter so far as you think you ought to, and, upon his whole testimony, and all you know, it is for you to say what degree of credit you give him. It is sometimes said that if a witness is found to have sworn falsely in one part, he should be disbelieved in anything he says. I do not understand that there is such a rule in law. The jury have the responsibility in such a case resting on them. In any given case, they may be satisfied a witness has sworn falsely with reference to one material matter, so as to make him entirely unworthy of credit, and they may set aside his testimony. In another case, where a witness has testified in regard to four important facts, and testified falsely in regard to one of them, the jury may, nevertheless, believe and think in regard to the other three he testified truly; and if they so think, in the exercise of their judgment they have the right to act upon it. In other words, there is no rule of law that requires a jury to disbelieve a witness in all he testifies because they disbelieve in part. It is a matter which the law leaves in their hands, uncontrolled by any rule."

The jury returned a verdict of guilty; and the defendant Clune alleged exceptions.

W. H. Brooks, for the defendant Clune.

C. L. Gardner, District Attorney, for the plaintiff.

ALLEN, J. The plea in abatement was not well founded. It was not necessary for the grand jury to examine the witnesses anew before finding the second indictment, and the fact that some of the grand jurors who found the original indictment were absent when the second indictment was found, and that others were present when the second indictment was found who

were absent on the former occasion, did not render the indictment invalid. *Commonwealth v. Woods*, 10 Gray, 477. *Commonwealth v. Woodward*, 157 Mass. 516.

The court correctly stated the rule of law as to the grounds upon which the defendant could be convicted as principal. But the defendant contends that the evidence was insufficient to show that he was present aiding and abetting Malley in uttering the check. We have some difficulty in fixing the position of the parties during the transaction, partly because the testimony is not precise, and partly because the plan referred to in the bill of exceptions has not been laid before us. The testimony, however, tended to show that the defendant prepared the forged check or order, and delivered it to Malley on the street, asking the latter to get a messenger boy to take it to the bank and to get the same cashed; that Malley walked up the street till he found a boy, and then down the street till he was nearly opposite the bank, when Malley sent the boy for the money; that it was obtained, and Malley received it from the boy, went into a drug store and got a bill changed, and paid the boy twenty-five cents, and when he came out of the drug store the defendant was coming across the street to where Malley was, and asked him if he had got the money, and received it from him, less the twenty-five cents. From this it might be inferred that the defendant, though not seen by the boy or by Malley, nevertheless may have kept them both in sight, and have remained near enough to be of aid to Malley in receiving the money promptly from him, or otherwise, as occasion might require. The case was properly submitted to the jury to determine, upon the evidence, whether the defendant was in a situation where he might actually aid Malley. *Commonwealth v. Lucas*, 2 Allen, 170. *Commonwealth v. Wallace*, 108 Mass. 12. *Commonwealth v. Knapp*, 9 Pick. 496, 517, 518. 1 Bish. Crim. Law, (8th ed.) § 653.

There was no legal error in refusing to instruct the jury that it would not be safe to convict upon the testimony of an accomplice, unless corroborated in a material point, or that such testimony should be scrutinized with great care and caution. *Commonwealth v. Wilson*, 152 Mass. 12. It is also to be observed that Malley was thus corroborated by the boy.

There is no rule of law that, if a witness has sworn falsely in one particular, it is unsafe for the jury to rely on any part of his testimony, or upon any uncorroborated statement by him; and the judge was right in refusing so to instruct the jury. The credibility of witnesses is for the jury; and if the defendant was entitled to have any comments made by the court upon Malley's testimony, the observations which were made were judicious, and were all that the defendant was entitled to.

Exceptions overruled.

COMMONWEALTH vs. SAMUEL REED.

Worcester. October 1, 1894. — October 18, 1894.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Intoxicating Liquors — Illegal Sale and Keeping — Judgment of Forfeiture — Conviction.

On the trial of a complaint against intoxicating liquors, under Pub. Sts. c. 100, § 80, no judgment of forfeiture can be rendered unless it is proved that the liquors seized, or some part thereof, were owned or kept or deposited by the person charged in the complaint. A judgment in such case, ordering the delivery of the liquors to a claimant who is not named in the complaint, settles nothing as to the legality or illegality of such claimant's intention.

One may be convicted of keeping a tenement used for the illegal sale and keeping of intoxicating liquors, upon proof that he kept the tenement for the purpose of having it used by somebody else for the illegal sale and keeping of liquor, although he did not intend to make any sale himself.

COMPLAINT, for the keeping of a tenement for the illegal sale and keeping of intoxicating liquors between May 1, 1892, and January 1, 1893, at Gardner.

At the trial in the Superior Court, before *Maynard*, J., it appeared by the record of the First District Court of Northern Worcester, that upon complaint made to that court on December 31, 1892, certain liquors therein named were, on June 18, 1892, and up to the date of the complaint, kept by the defendant and one Spencer upon the premises alleged in the complaint to be illegally kept by the defendant, and a warrant issued; that under it one and a half quarts of whiskey in two

bottles were found and seized upon the premises; that notice duly issued to the defendant and Spencer, and all other persons claiming an interest in the liquors, to appear and show cause why they should not be forfeited; that the notice was returned to court on its return day; that Webster Kendall appeared by counsel and claimed the liquors; that on January 18, 1893, a hearing was had, and the court found that the liquors were the property of Kendall, and ordered their return to him; and that on January 19, 1893, they were so returned.

One Wilson, a police officer of the town of Gardner, testified that the warrant was given to him to serve; that he and one McIntyre proceeded to search the premises; that he found behind the register counter of the hotel, in a pocket of an overcoat, a quart bottle of whiskey; that in the kitchen on the safe he found about one half-pint of whiskey in a bottle; that they found no other intoxicating liquors in the house; that the same liquors were brought on January 18, 1893, before the First District Court of Northern Worcester; that upon the hearing as to the forfeiture of the liquors he testified identically as he had in the case at bar; and that Kendall did not testify.

McIntyre testified that he was with Wilson in the search in question; that he testified in the lower court as Wilson testified; that he testified upon the question of the forfeiture of the liquors identically as he now testified, except that he testified in the lower court that Kendall claimed the liquors at the time of the finding; and that there was no evidence upon the hearing beside that of himself and Wilson. No further evidence was offered concerning these liquors except that, upon cross-examination, Kendall, called as a witness by the defendant, testified to the ownership of the liquors. It appeared in evidence that the premises in question were used by the defendant as a hotel.

One Briggs, a witness for the government, testified that in December, 1892, he stopped several days at this hotel; that at various times during this period he bought whiskey there from Kendall, who was a hostler for the defendant, from one Draper, who was clerk of the hotel, and from the defendant; that he had seen these parties make sales of whiskey to other persons; and that these sales to him and to other parties were usually made from a bottle taken from their pockets, but sometimes

from a bottle taken from a valise. He further testified that, in a conversation with the defendant in regard to the risks of the business, the defendant said that, if a raid was made, he would have some one claim the liquors; all of which evidence was denied by Draper, Kendall, and Reed.

At the close of the evidence, the defendant asked the judge to strike from the record the evidence as to the search and seizure. The judge refused so to do, and the defendant alleged exceptions. The defendant also asked the judge to instruct the jury that they were not to take into consideration the evidence as to the finding of the liquors upon the premises and that the record was conclusive in this case that the liquors were not kept there by the defendant for the purpose of illegal sale. The judge refused so to do, and instructed the jury that the record introduced was conclusive upon the government that the liquors seized upon the search-warrant belonged to Kendall, and the fact that they were found and were seized upon the premises upon the warrant, was not to be considered by them against the defendant, unless they should find that they were owned and kept there by Kendall for the purpose of being sold by the defendant and his servants within the scope of their authority.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

W. H. Atwood & J. A. Stiles, for the defendant.

F. A. Gaskill, District Attorney, for the Commonwealth.

ALLEN, J. The judgment in the seizure case determined conclusively against the Commonwealth that the liquors were not kept or deposited by the defendant and intended for sale by him contrary to law, and that Kendall was the owner thereof. But there was no determination and no trial of the question whether Kendall kept them with an intent to sell them in violation of law. Kendall was not named in the complaint; no charge was made against him. He appeared, as authorized by statute, to defend his title to his property. The person believed to be the owner, possessor, or keeper of the liquors, intending to sell the same contrary to law, must be particularly set out by special designation, both in the complaint and in the warrant, and the offence must be fully, plainly, and substantially described in both. Pub. Sts. c. 100, §§ 30, 32. Any other person claim-

ing an interest in the liquors and vessels seized may appear and make his claim verbally or in writing, and a record of his appearance is to be made, and he is admitted as a party on the trial, becomes liable to costs if he fails, and has a right of appeal. §§ 37, 40, 41. St. 1888, c. 277. Nevertheless, though he thus becomes a party for some purposes, there is no complaint nor charge against him, except indirectly that the property which he claims is kept or deposited with unlawful intent by somebody else. The proceedings are in their nature criminal, and no charge of crime is made against him, and no criminal charge can be tried without a complaint in writing. *Fisher v. McGirr*, 1 Gray, 1, 29, 35, 42, 43.

In *Commonwealth v. Intoxicating Liquors*, 122 Mass. 8, it was said that the claimant who appears becomes a party, as defendant in the prosecution, who is to answer the charges in the complaint. The language of the court referred to a claimant who was charged in the complaint as being the keeper of the liquors, and is not fully applicable to a claimant who is not named in the complaint.

The judgment in the seizure case is conclusive against the government only as to those facts which were necessarily involved therein. *Burlen v. Shannon*, 99 Mass. 200. *Sly v. Hunt*, 159 Mass. 151, 153. *Commonwealth v. Ellis*, 160 Mass. 165. Kendall's intention, whether lawful or unlawful, was not in controversy. The question of his title was the only one tried as to him. This being found in his favor, he was entitled to have his property delivered to him unless it was kept by Reed with unlawful intent. If the complainants wished to charge Kendall with keeping it with an unlawful intent, they should have made that averment in a formal way, in a new complaint. On the trial of a complaint against intoxicating liquors, no judgment of forfeiture can be rendered unless it is proved that the liquors seized, or some part thereof, were owned or kept or deposited by the person charged in the complaint. An illegal intention on the part of any other person is not charged or put in issue, and cannot be tried; but if such other person appears as claimant and maintains his claim successfully, it tends to negative the charge in the complaint.

It is consistent with the former judgment that Kendall may

have intended to sell the liquors unlawfully in the defendant's tenement; and under the instructions of the court the jury have found that the defendant was guilty of keeping his tenement for the illegal sale or keeping of liquors. This finding was warranted by proof that he kept his tenement for the purpose of having it used by Kendall for the illegal keeping and sale of liquors, although he did not intend to make any sale himself. *Commonwealth v. Lynch*, 160 Mass. 298.

The court therefore was right in refusing to give the ruling requested. *Exceptions overruled.*

COMMONWEALTH vs. AUGUST E. SKATT.

Worcester. October 1, 1894. — October 18, 1894.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Fishing in Artificial Pond without Permission of Proprietors — Statute.

The provisions of Pub. Sts. c. 91, § 27, which impose a penalty for fishing in that portion of a pond, etc. in which fishes are lawfully cultivated or maintained, contemplate in terms that the fish may be cultivated in a portion only of the pond, and the fact that there are other riparian proprietors into whose waters the fish may swim does not prevent the conviction of a person for fishing in such portion of the pond without the permission of the proprietors.

COMPLAINT, on Pub. Sts. c. 91, § 27, to the First District Court of Northern Worcester, for illegally fishing in a pond created by artificial flowage, and in which fishes were lawfully cultivated and maintained, the defendant not having permission from the proprietors so to fish.

At the trial in the Superior Court, before *Maynard, J.*, it was agreed that there was in the towns of Gardner and Westminster an artificial pond containing about two hundred acres; that Lewis A. Wright and Maria L. Wright owned in fee all the land covered by the water of the pond at high-water mark except about thirty acres; that in January, 1892, they posted in and about the pond, on land owned by them, notices to the effect that the pond was private, and that all fishing therein was

positively forbidden ; that in September, 1893, before the date of the defendant's fishing, they put into the water of the pond eleven hundred pouts obtained elsewhere ; that the defendant on the day laid in the complaint, without the consent of either of the Wrights, fished in the water of the pond which covered land owned in fee by them ; that there was nothing to prevent fishes put into that part of the pond by the Wrights from swimming into that part of the pond owned by other parties, or from going into another pond owned by one Greenwood, or from coming from that pond into the Wright pond ; that the Wrights did not have any lease of the right of fishing from the other owners of the pond, nor any agreement with them by which the Wrights were to have the exclusive right of fishing therein ; and that the defendant owned no part of the pond or of the land under the same.

Upon the foregoing agreed evidence the defendant asked the judge to direct a verdict in his favor. The judge declined so to do, and ruled that it was competent for the jury to convict.

The jury returned a verdict of guilty ; and the defendant alleged exceptions.

T. B. Dunn, for the defendant.

F. A. Gaskill, District Attorney, for the Commonwealth.

HOLMES, J. Artificial ponds are within the words and the reason of Pub. Sts. c. 91, § 27.* The defendant, without their permission, fished in a part of such a pond which covered land belonging to the Wrights, and was a trespasser in so doing. The words "without the permission of the proprietors," in the section referred to, mean without the permission of the proprietors of that part of the pond where the fishing takes place, including, no doubt, under the word "proprietors" lessees as well as owners. The only other words of the statute constituting the offence are that the fishing must be "in that portion of a pond . . . in which fishes are lawfully cultivated or maintained." The statute contemplates in terms that the fish

* This section is as follows: "Whoever without the permission of the proprietors fishes in that portion of a pond, stream, or other water in which fishes are lawfully cultivated or maintained, shall forfeit not less than one dollar nor more than twenty dollars for the first offence, and not less than five nor more than fifty dollars for any subsequent offence."

may be cultivated in a portion only of the pond. The fact that there were other riparian proprietors into whose waters the fish might swim does not prevent the operation of the section. *Commonwealth v. Vincent*, 108 Mass. 441. In *Commonwealth v. Perley*, 130 Mass. 469, although the exceptions show that it was "proved that the defendant fished in the pond without the consent of any of the proprietors or lessees," it did not appear that he was a trespasser on the property of those who propagated the fish, or, in the words of the statute, "in that portion of a pond . . . in which fishes are lawfully cultivated or maintained," and it was assumed that he was fishing in waters unprotected by statute (p. 471). If he was fishing over the land of one who was a stranger to those who stocked the pond, he was not fishing in a place where fishes were cultivated or maintained. In the present case the Wrights had stocked the pond. The statute is directed against a trespass, and all the elements of the trespass are here.

Exceptions overruled.

COMMONWEALTH vs. WILLIAM R. KENDALL.

Worcester. October 1, 1894. — October 18, 1894.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Indictment for Adultery — Divorce — Jurisdiction — Domicil — "Guilty beyond a reasonable Doubt" — Instructions.

If, at the trial of an indictment for adultery, the defendant having obtained a divorce in another jurisdiction and married again, the evidence with its legitimate inferences may well satisfy the reason and judgment of the jury, and convince them to a reasonable and moral certainty that the defendant's domicil remained in this Commonwealth, and that his purpose in going into another State was to get a divorce and not to change his home, a request for a ruling that the jury were not justified, upon the evidence, in finding him guilty, as it failed to show beyond a reasonable doubt that he was an inhabitant of this Commonwealth when the divorce was granted, is rightly refused.

INDICTMENT, for adultery with one Emeline B. Holman, at Worcester, on May 15, 1893. At the trial in the Superior Court, before *Maynard*, J., the government proved that the

defendant was married to one Almena D. Kendall in November, 1886, and that she was still living; and that the defendant cohabited with Emeline B. Holman, at Worcester, within the time covered by the indictment. The defendant put in evidence a divorce granted by the Circuit Court of the Second Judicial District of South Dakota, by its terms dissolving the bond of matrimony between the defendant and said Almena for the cause of desertion, at Worcester, April 14, 1888, and continued to the time of the institution of proceedings in South Dakota.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

F. P. Goulding, (*F. L. Dean* with him,) for the defendant.

F. A. Gaskill, District Attorney, for the Commonwealth.

MORTON, J. The defendant finds no fault with the construction put by the court upon the statute relating to foreign divorces, (Pub. Sts. c. 146, § 41,) nor with the instructions as to what was necessary to constitute a change of domicil.

There is no occasion, therefore, for us to examine into or express an opinion upon the charge of the presiding justice in relation to these matters, though we have some doubts as to its correctness.

The only objection which the defendant now makes is to the refusal of the court to rule, as requested in effect by him, that the jury were not justified, upon the evidence, in finding him guilty; the evidence failing to show beyond a reasonable doubt, as he contends, that he was an inhabitant of this State when the divorce was granted. A reasonable doubt is not a mere possible doubt. "It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge." *Commonwealth v. Webster*, 5 Cush. 295, 320. Proof beyond a reasonable doubt is such evidence as establishes "the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment, of those who are bound to act conscientiously upon it." *Commonwealth v. Webster*, *ubi supra*. Applying these definitions to the evidence, we think that the verdict was well warranted.

The defendant does not deny that the jury were justified in finding that he went to South Dakota for the purpose of getting a divorce. That question need not be considered, therefore, except as it bears upon the question of his inhabitancy. For many years before he went to Sioux Falls the defendant's home had been in Worcester. He had carried on business there, though he had sold it out in 1890, and presumably had formed such connections as one naturally would who had lived there for some time, and had been in business there. He left on November 1st or 2d, 1891, and reached Sioux Falls on the 5th or 6th. His departure was not accompanied, so far as appears, by any declaration that he intended to abandon Worcester as his home, though he testified that when he went away he did not intend to return. There was evidence that he had said, some time previously, that, if he could not get a divorce here, he would go West and get one, and he admitted, on cross-examination, that when he left Worcester he did not intend to live with his wife again, and that, in general, he wanted to get a divorce from her. Soon after his arrival at Sioux Falls he consulted an attorney about getting a divorce, and was told that it would require a residence of ninety days before the libel could be brought. On February 5, 1892, the ninety-first or ninety-second day after his arrival, the libel was filed, and the divorce was granted on the fourteenth day following. In the mean time he had bought a hotel business, which he sold, and then a candy business, which he also sold. At the time when the divorce was granted he was engaged in no business in Sioux Falls. In June, after obtaining his divorce, he left Sioux Falls and came to Worcester, where he remained, with the exception of about four weeks, when he went to Chicago, till his marriage to Emeline Holman, in March, 1893, which took place in Philadelphia, and after which he went with her to California and Colorado. He testified that he was seeking for a permanent home while in California and Colorado, and that his home was in Sioux Falls. It appeared at the trial that since leaving Sioux Falls, in June, 1892, he had not been there again, except to stop one night in passing through with said Emeline Holman after his marriage to her, and that he had had no business that called him there. It did not appear that before going

there in November, 1891, he had ever been there before, or had had any business there.

This evidence, with its legitimate inferences, well might satisfy the reason and judgment of the jury, and convince them to a reasonable and moral certainty that the defendant's domicile remained in Worcester, and that his purpose in going to Sioux Falls was to get a divorce, and not to change his home. The jury were not bound, as matter of law, to believe what he said about abandoning his residence at Worcester. They could accept some portions of his testimony, and reject others, according to what seemed to them to be the truth. The jury may properly enough have thought that the hotel business and the candy business were mere side issues, not interfering with the main purpose for which he went to Sioux Falls, and affording but slight evidence, under the circumstances, of a change of domicile.

Exceptions overruled.



SULLIVAN S. JONES vs. ABNER H. ADAMS & another.

Worcester. October 1, 1894. — October 18, 1894.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Deed — Reservation — Right of Drainage — Easement — Estoppel — Equity.

A reservation in a deed of land from B. of "the right to use the drain across the easterly corner of said premises for the same purposes as heretofore used to said B., his heirs and assigns," the grantee covenanting with said B., his heirs and assigns, that he will allow said drain to remain open and to be used as heretofore, creates an easement of drainage, which passes by a subsequent deed from B. of the dominant land without express words.

A reservation in a deed of land of "the right to use the drain across the easterly corner of said premises" is not nullified by the fact that the drain empties into a cesspool on the servient premises, or by the fact that the line of the drain on the servient estate cannot be fixed without digging.

The covenants of freedom from encumbrances and of warranty in a deed of land, over which an easement of drainage has been reserved in the prior conveyance to the grantor, apply to the estate as subject to the right of drainage.

If the reservation of an easement in a deed is express, upon a bill in equity to establish the easement this court will not consider the doctrine of easements reserved by implication.

A reserved right of drainage through an existing drain is not destroyed by the fact that the drain was once enlarged at the joint expense of the owners of the dominant and servient estates.

An estoppel to claim a right of drainage is not necessarily established by proof of declarations by the person claiming such right, to the effect that he did not claim under a deed expressly conveying it; especially when there was no intention to mislead and no change of position on the part of the person setting up such estoppel, in consequence of such declarations.

A bill in equity to establish a right of drainage by an existing drain through land of another may be maintained, if the right is denied, although the drain has not been actually obstructed or stopped by the owner of such land.

BILL IN EQUITY, filed in the Superior Court on May 1, 1893, against Abner H. Adams and Betsey G. Adams, his wife, to establish a right of drainage over land of the defendants. Hearing before *Dewey, J.*, who reported the case for the determination of this court, in substance as follows.

By deed dated August 1, 1866, Michael A. Blunt conveyed to one William Lawrence a portion of the premises now owned by the defendant Betsey G. Adams, "reserving the right to use the drain across the easterly corner of said premises for the same purposes as heretofore used to said Blunt, his heirs and assigns, and the grantee covenants with said Blunt, his heirs and assigns, that he will allow said drain to remain open and to be used as heretofore."

By deed dated July 8, 1867, Lawrence conveyed the same premises to Sarah E. Stewart, wife of James M. Stewart, subject to the same reservation as that expressed in Blunt's deed to Lawrence.

On September 1, 1868, one Leland conveyed to Sarah E. Stewart a parcel of land lying easterly of and adjoining the premises conveyed to her by Lawrence; and on October 1, 1872, Stewart and his wife conveyed to Betsey G. Adams the two parcels of land conveyed to Sarah E. Stewart by the deeds of Lawrence and Leland to her. This was a warranty deed with full covenants, and contained no reference to the drain.

By deed dated September 19, 1866, Blunt conveyed to the plaintiff a parcel of land adjoining that owned by Betsey G. Adams, with the privileges and appurtenances thereto belonging, and with full covenants of warranty, but the deed contained no reference to the drain or right to drain. All the deeds were duly recorded.

On the plaintiff's premises at the time of the conveyance to him there were, and still are, two dwelling-houses and various out-buildings. During his ownership he has occupied one of the houses with his family and a tenant, and the other has been occupied by tenants.

When the plaintiff took his deed from Blunt there were in actual use drains from his two dwelling-houses, uniting together on his land, and then as a single drain passing from his land into and upon the premises now of Betsey G. Adams, then owned by Lawrence. It was a stone drain on the plaintiff's land, and covered by about three feet of earth. The ends of the drain were visible in both the cellars of his houses. The course of the drain on the land of Betsey G. Adams was not visible. The drain on the plaintiff's land has been twice dug open by him down to the line of Betsey G. Adams's land, and the drain could be seen extending into her land, but it was not dug open by him on that land. The general course or direction of the drain on his land and on her land was pointed out to him before he took his deed.

In 1867, Stewart, acting for his wife, thought the drain, as it was on her land, was not large enough, and it was taken up by him, enlarged, and rebuilt. This drain was connected with and used by the Stewarts for the benefit of some of their buildings. By an arrangement with Stewart, the plaintiff paid a certain sum towards the expenses of reconstructing the drain.

The defendants not only deny the plaintiff's right of drainage in and upon their premises, but deny that there is or has been any drain in fact leading from his premises through and upon theirs. If there was any such drain, it did not appear to be disputed that it connected with a cesspool located at some point on land of Betsey G. Adams.

The judge stated in relation to this subject:

"I am unable to determine where the line of the drain on the defendant's land was located when the plaintiff took his deed, and where it is located now. Neither can I determine where the cesspool was situated with which it connected then, nor where is the cesspool with which it is connected now, but I am satisfied, and find as a fact, that when the plaintiff took his deed there was and ever since has been a drain in actual use leading

from the cellars of the plaintiff into the premises of the defendant Betsey G., and connecting with a cesspool located somewhere on the premises of the defendant Betsey G. described in the plaintiff's bill. I find the use of the drain is of great convenience and importance to the premises of the plaintiff, and that, owing to the grade and nature of the soil and the size of his premises, it is not practicable for him to construct cesspools on his own land, and that there is no public drain or sewer, or other rightful way of drainage, available to him. I find that neither of the defendants has intentionally or otherwise obstructed or stopped the drain claimed by the plaintiff on land of said Betsey G. I find that in 1873 there was an obstruction of the drain on land of said Betsey, and that the plaintiff went on the premises with men to open the drain by digging, and said Abner H., acting for his wife and himself, denied the plaintiff's right to dig and open the drain, and refused to allow him to do so, and the plaintiff and his men withdrew without opening the drain. The obstruction seemed to be but temporary, and after a little time the water flowed away from the plaintiff's premises, and there has been no serious trouble since with water in the plaintiff's cellar till about December, 1892."

In December, 1892, the drain was again obstructed on the premises of Betsey G. Adams, and the water was in the cellars on the plaintiff's premises for several months, at times varying in depth from seven inches in some places to two feet in others. From early in April until the middle of May, 1893, the plaintiff pumped the water from his cellar three or four times a day. There was a drain from a sink in his house to connect with the drain running from his cellar, and by the obstruction the sink water was set back into the cellar. The result was that his cellars were rendered muddy, wet, and unwholesome.

There was no examination by Betsey G. Adams, or by any one for her, of the title to her premises before she took her deed, and she had no knowledge in fact of the reservation in the deed from Blunt to Lawrence. Abner H. Adams testified that, after he and his wife had purchased the premises now owned by her and were occupying them, but before she had received her deed and paid the price, he had heard something about the plaintiff's drain; that he inquired of the plaintiff if he had any right to drain

across the premises ; and that the plaintiff said he did not claim to have any legal right to drain, and that Stewart put in a drain and he ran his drain into it.

John Q. Adams, a brother, testified to the same effect in regard to the interview. Another brother, Zebadiah A. Adams, testified to substantially the same statement as that made by the plaintiff when he came on to the Adamses' premises in 1873 to open the drain as hereinbefore stated. The plaintiff testified that he never had said to Abner H. Adams that he did not claim a legal right to drain across the Adamses' land.

The judge further stated :

"I am satisfied that neither the defendants nor the plaintiff intended to give other than a true account of what was said, but that there was some confusion in their understanding and memory between having a right in law to drain, and having a deed conveying the right, and that the plaintiff intended to give the idea that he did not claim a right to drain under a deed expressly conveying the right to drain, but did not disclaim having any right. I find that the plaintiff had no intention to mislead Adams in what he said to Adams on this subject at the interview prior to Mrs. Adams's taking her deed. If the plaintiff is entitled to damages, I assess them in the sum of one hundred dollars."

S. H. Tyng, for the plaintiff.

T. G. Kent, for the defendants.

ALLEN, J. This case presents no question of difficulty. On the facts reported, the plaintiff is entitled to a decree, enjoining the defendants from preventing him from clearing out the drain. An easement of drainage was created by the reservation ; *Claflin v. Boston & Albany Railroad*, 157 Mass. 489, 493 ; and it passed by the deed to the plaintiff without express words. *Barnes v. Lloyd*, 112 Mass. 224.

The various suggestions and arguments of the defendants may be briefly dealt with.

The defendants contend that the plaintiff must prove that there was a drain across the easterly corner of the granted premises, and that said drain still exists, and that it had been used to drain the cellars of the two buildings on the plaintiff's lot. That is so ; but all this appears by the finding of the judge. The

fact that the judge could not fix the line of the drain on the defendants' land, or the situation of the cesspool, does not show that no drain or cesspool existed. There is no reason to suppose that there were two drains across that corner of the defendants' lot, and the plaintiff by digging on his own land can ascertain where the drain enters the defendants' land, and its further course can be traced by digging, without undue disturbance of the defendants' other land.

The defendants contend that the reservation is of a right "to use the drain across the easterly corner" of the lot, and that the right now claimed is different, viz. to use a drain which ends in a cesspool on the defendants' premises. If it were conceded that by the correct use of English the words "across the easterly corner" imply that the drain emptied at or beyond the farther line of the lot conveyed, so trivial an error in strictly exact phraseology would not nullify the reservation of the easement.

The covenants of freedom from encumbrances and of warranty apply to the estate as granted, i. e. subject to the right of drainage. *Wood v. Boyd*, 145 Mass. 176. *Brown v. South Boston Savings Bank*, 148 Mass. 300, 304.

The reservation being express, there is no occasion to consider the doctrine of easements reserved by implication.

The enlargement of the drain by Stewart during his ownership, which was made at the joint expense of himself and the plaintiff, did not destroy the identity of the drain, nor defeat the plaintiff's right to use it.

The findings by the judge negative the idea of an estoppel upon the plaintiff to assert his right to use the drain.

The evidence sufficiently shows a denial by the defendants of the plaintiff's right.

Decree for the plaintiff.

COMMONWEALTH vs. HENRY F. BOUTWELL.

Worcester. October 1, 1894. — October 18, 1894.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Intoxicating Liquors — Evidence — Instructions — Exception.

At the trial of a complaint against an apothecary for unlawfully exposing and keeping intoxicating liquors for sale from May 1 to August 6, 1894, it appeared that the liquors were found in sundry bottles, and that there was also other evidence tending to show that they were kept for unlawful sale. After giving general pertinent instructions not objected to, the judge told the jury that the defendant, as an apothecary, had a right to have intoxicating liquors to be used solely to mix with other ingredients as a medicine, and that, if they should find that they were kept solely for that purpose, they should return a verdict of not guilty, but that if they should find that they were kept for sale they should return a verdict of guilty. There was no evidence which called for any other instructions, the defendant did not testify, there was nothing to show that any part of the liquors were on hand before May 1, as a part of the defendant's stock when he held the license to sell for medicinal and similar purposes; and if they were a part of his former stock, there was nothing to show that he was keeping them at the time of the seizure for any other purpose than either to sell or to mix with other ingredients as a medicine. *Held*, that the defendant's statement to the police officers at the time of the seizure, that part of the liquors were on hand before May 1 as a part of his stock when he held the license to sell for medicinal and similar purposes, was not evidence in his favor, that the instructions were appropriate, and that the judge was not called upon after the close to give, at the request of the defendant, an instruction founded on a hypothesis of fact of which there was no direct evidence but only a possibility of an inference.

If, at the trial of a complaint for unlawfully exposing and keeping intoxicating liquors for sale, reasons given to the defendant's counsel for refusing a ruling requested by him, and a ruling made in connection with such refusal, were no part of the instructions to the jury, and if they did the defendant no harm, even though erroneous, the defendant has no ground of exception.

COMPLAINT to the Police Court of Fitchburg, for unlawfully exposing and keeping intoxicating liquors for sale from May 1, 1894, to August 6, 1894. At the trial in the Superior Court, on appeal, before *Lilley, J.*, the jury returned a verdict of guilty; and the defendant alleged exceptions. The material facts appear in the opinion.

C. F. Baker, for the defendant.

F. A. Gaskill, District Attorney, for the Commonwealth.

KNOWLTON, J. The only exceptions in this case are to the refusal of the presiding justice to give an instruction requested

after the close of the charge to the jury, and to the reasons given for refusing the instruction, and to the ruling made in that connection.

The defendant was an apothecary, and upon a search of his premises on August 4, 1894, intoxicating liquors were found in sundry bottles. There was also other evidence tending to show that the liquors were kept for unlawful sale; and it appeared that the defendant had a sixth class liquor license as druggist and apothecary from May 1, 1893 to May 1, 1894. The judge gave general instructions "applicable to the case and not objected to," and told the jury that the defendant, as a druggist and apothecary, had a right "to have in his possession intoxicating liquors in any quantities to be used solely for the purpose of mixing and combining with other ingredients as a medicine, and that the only question for the jury was to decide whether the liquors found in the defendant's possession were so kept by him solely for the purpose of combining with other ingredients as a medicine, or were kept to be sold in violation of law; that if they should find that they were so kept solely for combining with other ingredients as a medicine, the jury should return a verdict of not guilty, but that if they should find that they were kept for sale they should bring in a verdict of guilty." Under the instructions, the jury could not find the defendant guilty unless they were satisfied beyond a reasonable doubt that the liquors were kept for sale. So far as appears, there was no evidence which called for any other instructions. The defendant did not testify, and there was nothing to show that any part of the liquors were on hand previously to May 1st, as a part of his stock when he held the license to sell for medicinal, mechanical, and chemical purposes. His statement to the police officers to that effect at the time of the seizure was not evidence in his favor. But if the liquors were a part of his former stock, there was no testimony that he was keeping them there at the time of the seizure for any other purpose than either to sell or to use in combination with other ingredients as a medicine. We are of opinion that the charge as given was appropriate to the case, and that the judge was not called upon after the close of the charge to give, at the request of the defendant, an instruction founded on an hypothesis of

fact of which there was no direct evidence, but only a possibility of an inference. *McMahon v. O'Connor*, 137 Mass. 216. *Ela v. Cockshott*, 119 Mass. 416.

The reasons given to the defendant's counsel and the ruling made in connection with the refusal to instruct were no part of the instructions to the jury, and if they were erroneous in any particular they did the defendant no harm.*

Exceptions overruled.

ADIN THAYER, Judge of Probate, *vs.* JOSEPH KINSEY.

Worcester. October 2, 1894. — October 18, 1894.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Executor and Administrator — Investment by Executor — Effect of Subsequent Acts of Administrator de bonis non.

An executor, acting in good faith, bought with the funds of the estate in his hands shares of stock in a corporation, of which he was an officer and the principal stockholder; and the only persons interested in the estate approved the purchase. He resigned his trust, and, in settlement with the administrator *de bonis non* of the estate, turned over to him a certificate for the shares so bought. The administrator accepted the same without protest, and for a long time after such transfer, and while he retained the shares and received dividends thereon and voted by proxy at the stockholders' meetings, the stock was worth as much as the amount of the trust funds invested therein, or more, and, if he had declined to receive the shares, or had within a reasonable time retransferred or redelivered the same to the executor, the latter could have sold them for an amount at least equal to their cost. The administrator retained the stock until,

* At the close of the judge's charge to the jury, the defendant asked him to add the following: "If the jury should find that the bottles of liquor were a part of his stock of last year, when the defendant had a license, and that after the license expired the same were left by him in his store with no intent to sell the same, then the presence of such liquors is not a violation of law." The judge declined to give this ruling, stating that he declined to do so for the reason that no evidence had been offered to show that the defendant was a registered pharmacist during the time covered by the license, or any part thereof, and ruled that without such evidence the license put in evidence in and of itself alone afforded no protection or justification for the possession of the liquors prior to May 1, 1894, and that for this reason only he refused to give the ruling prayed for.

for causes for which the executor was not responsible, it became worthless. *Held*, in an action on the executor's bond, that he was entitled to be credited with the sum invested in the stock.

CONTRACT, on a bond in the usual form, given by the defendant as principal and two other persons as sureties, conditioned, among other things, that the defendant, who had been appointed executor of the will of Henry C. Ammidown, should administer the estate according to law, and render an account. The breaches alleged were that the defendant had not administered the estate according to law, and had failed to account.

The case was referred to an auditor, who found that in January, 1884, the defendant, out of the funds of the estate in his hands, bought sixty-three shares of the stock of Post and Company, an Ohio corporation, paying therefor \$6930; that, at the time of such purchase, he was an officer and the principal stockholder in the corporation; that he made certain representations in relation to the corporation to the widow of the deceased before the purchase; that the widow and the daughter of the deceased, who were the only persons interested in the estate, approved the purchase; that the defendant did not disclose to them that he was the principal stockholder in the corporation, nor that the money was then in the corporation's hands, loaned to it, nor that the business depended on his own activity and health, nor that he had bought of himself or his wife the sixty-three shares he so conveyed to the estate, nor that, under the law of Ohio, a stockholder in Post and Company was liable to the amount of the par value of the stock held for debts of the corporation, which could be enforced against him as trustee, and which might consume the whole remainder of the trust estate; that the defendant, upon his resignation as executor in 1886, in settlement with the administratrix *de bonis non*, turned over to her a certificate for the sixty-three shares of stock; and that the defendant was indebted to the estate in a sum named, which included the amount so paid for the stock.

Hearing before *Barker, J.*, who reported the case for the determination of the full court, in substance as follows.

The defendant resigned his trust as executor of the will of Henry C. Ammidown in 1886, and Mary T. Ammidown, the

latter's widow, was appointed administratrix *de bonis non*, with the will annexed.

On April 6, 1886, the administratrix received, among other things, a certificate of sixty-three shares of Post and Company stock. The principal question was whether, in determining the amount for which execution should issue against the defendant, a credit should be given for the whole or for any part of the amount invested by him in the purchase of said sixty-three shares of stock; the defendant contending that the whole amount so invested should be credited, and the plaintiff contending that no credit should be allowed therefor.

In addition to the facts stated in the auditor's report, and bearing upon this question, the judge found that, in making the investment of \$6930 of the funds of the estate in said sixty-three shares of stock, and in transferring the shares to the administratrix *de bonis non*, upon resigning his trust, and in all other matters and things concerning his trust as executor, the defendant acted in good faith and with honest intentions, and that he never intentionally deceived or withheld information from either of the persons interested in the estate; that Mary T. Ammidown was a relative of the family of the defendant, and she had visited in Cincinnati, Ohio, and had there had means of knowledge as to the business and standing of the Post and Company corporation, and that, in assenting to the purchase of the sixty-three shares of stock, she did not act solely upon the representations of the defendant; that for a long time after she had, as administratrix, received the transfer of said stock, and while she retained the same, and received dividends thereon, and voted by proxy at the stockholders' meetings, the stock was worth as much as, or more than, the amount of the trust funds invested therein, and might have been readily sold for at least that amount, and, if she had declined to receive the same, or had within a reasonable time retransferred or redelivered the shares to the defendant, he could have sold the same for an amount at least equal to \$6930; that she did not place the stock within the control of the defendant, but herself retained the same until, from causes for which he was not responsible, it became of no value; and that, while there was a liability upon the holders of the stock for the debts of the corporation, those debts

have been paid, and were never a source of real danger to the administratrix or to the funds in her hands.

H. H. Buck, for the plaintiff.

J. M. Cochran, for the defendant.

ALLEN, J. When Mrs. Ammidown, as administratrix *de bonis non*, received the transfer of the sixty-three shares of Post and Company stock, she was the sole representative of the estate, and as such it was her province and duty to collect and receive the assets remaining unadministered from the original executor. *Wiggin v. Swett*, 6 Met. 194. *Newcomb v. Williams*, 9 Met. 525, 538, 539. *Fay v. Muzzey*, 13 Gray, 53. *Browne v. Doolittle*, 151 Mass. 595, 600. *Foster v. Bailey*, 157 Mass. 160. Being the representative of the estate, she might give a release, submit a claim to arbitration, or make a compromise. She had the same power, with respect to estate left unadministered, as the original executor. Wms. Ex. (6th Am. ed.) 961. *Bean v. Farnam*, 6 Pick. 269. *Chadbourn v. Chadbourn*, 9 Allen, 173. *Blake v. Ward*, 137 Mass. 94. It was within her power, if she saw fit to do so, to have an accounting with the original executor, and to settle with him.

We may assume that the investment in Post and Company stock was one which the court would not sanction, and for which the executor would be held personally responsible in case of loss. The auditor finds that, in settlement with the administratrix *de bonis non*, the executor turned over to her a certificate for the sixty-three shares. The justice who heard the case finds, in addition, that for a long time after she received this transfer, and while she retained the same and received dividends thereon, and voted by proxy at the stockholders' meetings, the stock was worth as much as, or more than, the amount of trust funds invested therein, and might readily have been sold for at least that amount; and that if she had declined to receive the same, or had within a reasonable time retransferred or redelivered the same to the former executor, he could have sold the same for an amount at least equal to the cost thereof. But she retained the same.

There appears to be no reason to doubt that he made this transfer to her as and for an asset of the estate in which he had properly invested the funds of the estate, or at any rate as an

asset which was then worth what it had cost. If she entertained a different opinion, she might have protested that in receiving the shares she would take them for only so much as they were then worth, or she might have declined to receive them at all, and looked to his bond. *Burgess v. Keyes*, 108 Mass. 43, 45. But she did nothing of the kind. She took the shares without protest or objection, and kept them for a long time, and in point of fact they were worth their full cost. She accepted them. She did not make it known that she took them on any other terms than those upon which they were offered to her. At least she must be held to have taken them as and for as much as they were worth. Whether by her acceptance of the shares without objection she is precluded from afterwards saying that she took them on different terms from those upon which they were offered, or whether she, by taking them, became bound to give credit to him for their actual value at the time, or at such time as she by reasonable diligence could have disposed of them, in either case the result is the same.

Upon the report, the executor is entitled to be credited with the sum of \$6930, invested in the shares. No other question, as we understand the report, is presented for our decision.

So ordered.

MARY F. FISHER *vs.* METROPOLITAN LIFE INSURANCE
COMPANY.

Worcester. October 2, 1894. — October 18, 1894.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Life Insurance — Husband and Wife — Fraud — Action — Presumption.

If a married woman who signs her husband's name, without his knowledge or consent, to an application for a policy of insurance which is issued upon his life for her benefit, and which, by the rules of the insurance company to which it is subject, is rendered void by her act, was innocent of any fraudulent intent, and was deceived by the agent of the insurance company and induced by his fraudulent representations to make the application, she can rescind the contract of insurance when she discovers the fraud, and recover back the amount of premiums paid by her on the policy.

There is no presumption of law that a married woman, who signed her husband's name, without his knowledge or consent, to an application for a policy of insurance, which was issued upon his life for her benefit, and which by the rules of the insurance company to which it was subject was rendered void by her act, knew the rules, which were not contained in the application signed by her, but were printed in a small receipt-book which came into her possession after the policy was issued.

CONTRACT, for money had and received. After the former decision, reported 160 Mass. 386, the case was tried in the Superior Court, before *Hopkins, J.*, who allowed a bill of exceptions, in substance as follows.

The plaintiff offered evidence tending to show that one William Bannigan was the duly authorized agent of the defendant to solicit insurance; that Bannigan had often solicited James G. Fisher, the husband of the plaintiff, to insure his life in the defendant company for the benefit of the plaintiff, which he refused to do; that thereafter Bannigan came to the plaintiff and asked her why she did not insure her husband's life for her own benefit without letting her husband know anything about it; that to this she replied, "I can't do it, can I?" and Bannigan said, "Yes, just as well as not," and "we could get it out and not let him know anything about it as long as he did n't care to be insured," and she replied that she would talk it over with her daughter and let him know; that later Bannigan saw her again and asked if she had talked it over with her daughter, and she informed him that she had, and that she had concluded to take out a policy, if it could be done as Bannigan had said; that Bannigan said he would bring in an application and have the plaintiff sign it; that he afterwards brought the application and told the plaintiff where to sign it; that he also told the plaintiff that he would bring in a physician some time when he was passing by and pass him off as a friend, and the plaintiff's husband need not know anything about the examination, but Bannigan would pass it off as a call; that a short time after Bannigan called with a physician, whom he presented to the family as a friend, and a general conversation was had, but there was nothing said about the plaintiff's husband being examined at that time; and that Bannigan afterwards brought a policy of insurance upon the life of the plaintiff's husband in the sum of \$500, payable to her in case of his death, and a book upon which was

to be kept the payments made, and which contained extracts from the rules and regulations of the defendant, hereinafter referred to, and gave them to the plaintiff, and she placed them in a drawer.

The plaintiff testified that, at the time she signed the application and took out the policy, she did not know of the rules and regulations of the defendant; that the plaintiff paid from her own money to duly authorized agents of the defendant, but without the knowledge or consent of her husband, the premiums stipulated in the policy until July, 1892; that on July 21, 1892, when she had made all the payments on the policy that she did make, she was told by a former agent of the defendant that the policy was worthless because her husband did not know of the insurance; and that she then wrote the following letter to the defendant's president: "My husband James G. Fisher is insured under policy 5667412, and I have just found out that it is against the rules, and I could not collect anything as he does not know it. Your agent told me it was all right, now they tell me I could not collect it but can get my money back. It has been two years and four months. I write saying that I will like my money back; the agent knew all the time my husband was ignorant of it, but told me I would get the insurance just the same. Mr. Bannigan insured him, he was Ast. Superintendent at the time, please write immediately and let me know." No written reply was received to this letter, but soon afterwards one Travis, a duly authorized agent of the defendant, called upon the plaintiff and said to her that, with her husband's assent, the policy could be fixed up and made payable, which she refused to consent to; and the defendant refused to refund the money paid by her.

The plaintiff's husband testified that Travis called upon him and urged him to sign a printed paper, which he carried with him, assenting to the insurance, which he refused to do; that this was the first he knew about the insurance; and that at no time, before or after the issuing of the policy, did he sign the examination form on the back of the application, or authorize any one else so to do.

The material portions of the rules and regulations of the defendant, which were put in evidence by the plaintiff, and to

which the policy was subject, were as follows: "Under no circumstances can an application be written upon the life of a husband for the benefit of his wife, or upon a wife for her husband, or (a legal insurable interest existing) upon the life of any person for another's benefit (children excepted) unless the life upon which the policy is applied for fully understands and consents to the insurance, is examined by a physician of the company if the amount is over \$200, or by an agent if under that sum, and unless the proposed insured personally signs the examination form on the back of the application, after the answers in said application are all recorded, and not otherwise. Any policy obtained in violation of these rules will be null and void."

The husband and the daughter of the plaintiff both testified that the name of the husband on the back of the application looked like the writing of the plaintiff. The plaintiff herself testified that she signed her own name to the front of the application, but had no recollection of signing her husband's name on the back, but that she would not swear that she did not. There was no other evidence showing when or by whom the signature of the husband was written on the back of the application.

The defendant asked the judge to rule as follows: "1. The plaintiff cannot maintain the action upon the testimony introduced. 2. The representations were not of such materiality as to entitle her to avoid the policy of insurance, or to maintain this action for the recovery of the money paid thereon." The judge declined so to rule; and the defendant excepted.

The defendant also asked the judge to rule, that, if the plaintiff forged her husband's name with the intent to deceive the defendant, and the defendant issued the policy in good faith, she could not thereby avoid the policy or maintain this action.

The judge gave this instruction, adding, "But if she signed his name by direction of the agent, and was innocent of any fraudulent intent in so doing, but was deceived by him and induced to sign it by his fraudulent representations, she might maintain the action."

The defendant asked for the following instructions to the jury: "If the evidence shows that the plaintiff agreed to be bound by the rules of the defendant by an agreement in writing

signed by her, and that she had in her possession those rules in the book upon which payments were made weekly by her for a period of two years and four months, the law will presume that she knew what the rules were, and, if she failed to read the rules of the company thus agreed to and being in her possession, she cannot plead ignorance of the rules, and if she knew or had presumably knowledge by the rules of the company that she could not hold a valid policy of insurance without the knowledge of her husband, and with that knowledge took out this insurance and continued to make the payments with such knowledge, she could not avoid the policy or maintain this action, even if Bannigan made the representations testified to by her, and even though the policy was void."

The judge read this instruction to the jury, and said: "So far as I understand that request, some portions I give you and others I do not. I cannot say to you that the law makes it a presumption that she knew what the rules were. It is a question for you to say whether, when she signed the application, she knew anything about the rules of the company."

The defendant further requested the judge to rule as follows:

"If the plaintiff knowingly participated in the fraudulent acts of Bannigan for the purpose of defrauding the company, and the company, without knowledge of the fraud, issued the policy in good faith, the plaintiff cannot recover.

"If the plaintiff, with intent to deceive the company, or to carry out the fraudulent act of obtaining insurance which could not lawfully be obtained, acted in collusion with Bannigan, and the policy was thereby obtained and issued by the company in good faith, the plaintiff cannot recover."

The judge gave both these instructions with this addition: "But if she was innocent of any fraudulent intent, and was deceived by Bannigan, and induced by his fraudulent representations to make the application, then she could rescind the contract of insurance when she discovered the fraud, and recover the amount of the premiums she had paid."

The defendant also requested the following ruling: "If the plaintiff wrote her husband's name with intent to deceive the company, and without the husband's knowledge or consent, she cannot recover." The judge gave this ruling, and added:

"But if she signed his name by direction of the agent, and was innocent of any fraudulent intent in so doing, but was deceived by him and induced to sign it by his fraudulent representations, then so far she could recover."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

W. A. Gile, for the defendant.

J. R. Thayer, for the plaintiff.

KNOWLTON, J. The evidence at the former trial was substantially the same as that now before us, and the questions of law already decided in the case leave little open to the defendant on this bill of exceptions.

The exception to the refusal of the court to give the first two rulings requested by the defendant is covered by the former decision, in which it was said that, if the plaintiff "was innocent of any fraudulent intent, and was deceived by Bannigan and induced by his fraudulent representations to make the application, then she could rescind the contract of insurance when she discovered the fraud, and recover back the amount of the premiums which she had paid." 160 Mass. 386, 391. It is now argued that, under St. 1892, c. 372, the policy was binding upon the company, and that therefore she cannot recover. But if this statute, passed after the policy was issued, applies to the case, which we do not intimate, the policy is still void or voidable under the rules of the company, which require the examination form on the back of the application to be personally signed by the insured, and provide that, if it was not so signed, the policy shall be void.

All but one of the other instructions requested by the defendant were given in terms, with an addition which permitted the jury to find for the plaintiff if they found that she was innocent of any fraudulent intent and was induced to sign the application by Bannigan's fraudulent representations. This addition to the instructions requested was warranted by the evidence, and was in accordance with our former decision.

The only other exception was to the refusal of the judge to rule that the plaintiff was presumed to know the defendant's rules and regulations. These rules were not contained in the paper signed by her, and she testified that she did not know them

until she had made all the payments that she made at all. These rules were printed in a small receipt-book, which came into her possession after the policy was issued, and there is no presumption of law that she read them before making her payments.

Exceptions overruled.

COMMONWEALTH vs. JOHN J. WALSH & another.

Berkshire. September 11, 1894. — October 19, 1894.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

Trial — Charge to Jury — Exceptions.

If, at the argument of a case, the counsel states the evidence on a certain point differently from what the presiding judge supposes it to be, it is within his province to call the counsel's attention to the fact, and to state what his recollection of it is, and also, in his charge to the jury, to call their attention to the question of what the evidence is, leaving the question to their determination; and such a course is not a charge upon a matter of fact, within the prohibition of Pub. Sta. c. 153, § 5, but merely a reference to the testimony which the judge has a right to make.

If a bill of exceptions in a criminal case states that the presiding judge, in his charge to the jury, said that there was a dispute between the defendant's counsel and the prosecuting attorney as to what the defendant testified on a certain point, and the defendant contends in this court that there is nothing in the bill of exceptions to show that there was any foundation for the statement of the judge, but the bill does not state in terms that there was no such dispute, nor purport to set forth all that was said on the subject by the prosecuting attorney, the defendant shows no ground of exception.

At the trial of an indictment against A. and B. jointly, for breaking and entering a dwelling-house and stealing therein, it appeared that, for several days next prior to that on which the crime was committed, the defendants had been working in a ditch near the house; and there was evidence tending to show that, on the day in question, the defendants saw the occupants of the house after they had left it to go to their work. A. testified that he started to go to work that day. The judge, in charging the jury, instructed them that if A. said that, it was for them to say "whether the defendants did not change their minds about that after they saw" the occupants of the house, "and knew the house was empty." *Held*, that the language of the judge was not open to the objection that the jury were instructed what inference to draw from A.'s testimony; and that the attention of the judge should have been called to the point that the language used by him was not properly applicable to both defendants.

INDICTMENT, against John J. Walsh and Thomas Casey, for breaking and entering the dwelling-house of Simeon B. Small

and George B. Small, on July 26, 1892, at Pittsfield, and stealing therein. Trial in the Superior Court, before *Sheldon, J.*, who allowed a bill of exceptions, in substance as follows.

The defendants testified, and there was other evidence also tending to show, that they had, for several days next prior to the day when the house in question was broken and entered, worked digging a ditch in Dalton not far from the house. They also testified that, upon the night next prior to the day when the house was broken into and entered, they had a fight with some men in Dalton, in which one of the defendants received a severe cut on his right hand, and during which the other defendant hit one of the men with whom they were fighting a severe blow with a club, knocking him down, when the defendants ran away, leaving the man on the ground; and the defendants gave this as the reason for their leaving their work, and also trying to avoid the officers on the day when the house was broken into and entered. Simeon B. Small and his wife testified to seeing the defendants, on the morning of the day during which the house was broken into, near the house of one Lamb, which appeared not to be far from the ditch, where the defendant Walsh was talking to a lady; and that the defendant Casey stood some twenty feet away when Simeon B. Small and his wife were going to their work. The defendants testified that they did not see Simeon B. Small nor his wife that morning. George B. Small testified that he was that morning at his work in that ditch, to which place he walked with Simeon B. and his wife, and that within three minutes after his brother left him the defendants came down where he was and said they were going off to drink. The defendant Walsh testified, on cross-examination, relative to leaving his boarding place that morning, and the defendants' counsel contended that he said that he started to go down to the work, meaning to the place where he had been at work, and so argued to the jury, and argued that he did not say that he started to go to work, nor with what purpose he started to the work; whereupon the judge stated, in presence of the jury, that his recollection of Walsh's testimony was that he started to go to work. The district attorney argued to the jury that the Smalls met the defendants going toward their house.

The judge, when instructing the jury, said that it was in dispute between the counsel for the defence and the prosecuting attorney as to what Walsh had said; that his recollection was that Walsh had said that he started from the house to go to work, and, if he said that, it was for them to say whether the defendants did not change their minds about it after they saw the Smalls and knew the house was empty, and after they left their house to go to work on the ditch; and that the jury must give no more weight to the statement of the judge as to what the evidence was than they would to the statement of the defendants' counsel or of the district attorney, but must give no weight to either, and must rely on their own recollection of what the evidence was.

The jury returned a verdict of guilty against each defendant; and the defendants alleged exceptions.

W. Turtle, for the defendants.

C. L. Gardner, District Attorney, for the plaintiff.

LATHROP, J. The defendants contend that the provisions of the Pub. Sts. c. 153, § 5, were violated by the justice who presided at the trial in the Superior Court, and that they are therefore entitled to a new trial. This section is as follows: "The courts shall not charge juries with respect to matters of fact, but may state the testimony and the law." It was undoubtedly within the province of the presiding justice, if the defendants' counsel in his argument stated the evidence differently from what the justice supposed it to be, to call his attention to the fact, and to state what his recollection of it was. He could also in the charge to the jury call their attention to the question of what the evidence was, leaving the question to their determination. This is what was done in this case, and the defendants have no ground of exception. It was not a charge upon a matter of fact, but merely a reference to the testimony which the justice had a right to make. *Eddy v. Gray*, 4 Allen, 435, 438. *Durant v. Burt*, 98 Mass. 161, 168.

It is further contended that there is nothing in the bill of exceptions to show that there was any foundation for the statement of the justice that there was a dispute between the counsel for the defendants and the prosecuting attorney as to what the defendant Walsh testified. The bill of exceptions, however,

does not state in terms that there was no such dispute, nor does it purport to set forth all that was said on the subject by the attorney for the Commonwealth. The defendants, therefore, show no ground of exception.

The further contention is twofold in its character. It is said that the justice had no right to instruct the jury what inference was to be drawn from the testimony, assuming it to be as the government contended, and that in any event the testimony of Walsh as to his intention could not bind the other defendant. The language of the court is not, however, open to the objection that the jury were instructed what inference to draw. They were merely told, in effect, that it was for them to say whether they would draw a certain inference, if it seemed a proper one for them to draw. See *Commonwealth v. Clifford*, 145 Mass. 97; *McKean v. Salem*, 148 Mass. 109; *Commonwealth v. Keenan*, 148 Mass. 470. No doubt, as the defendants contend, if Walsh changed his intention, this would not tend to show that the other defendant changed his intention; but the objection was a general one, and the attention of the judge should have been called to the point that the language used by him was not properly applicable to both defendants. *New Hampshire Ins. Co. v. Healey*, 151 Mass. 537. *Dolan v. Alley*, 153 Mass. 380.

Exceptions overruled.

HENRY L. GLEASON vs. F. S. NELSON.

Franklin. September 18, 1894. — October 19, 1894.

Present: ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

Broker — Sale — Purchaser — Commissions — Instructions.

In order that a broker may recover of the owner of property a commission for effecting the sale of the same, the general rule of law is, that, if there was no direct communication between the broker and purchaser, it must be shown affirmatively that the latter was induced to enter into the negotiations which resulted in the purchase through the means employed by the broker for that purpose. A request by the broker for a ruling that, if the owner agreed to pay him a certain amount if he found the owner a customer or made a sale, then he was entitled to the promised commission, if the jury were satisfied that the pur-

chaser obtained his knowledge that the property was for sale from persons with whom the broker negotiated for the sale, and, acting thereon, went to see the place and bought it of the owner, is rightly refused; and instructions to the effect that the jury are to determine whether the broker was the cause or instrumentality or the efficient or effective means of bringing the purchaser and seller together are correct.

CONTRACT, to recover the price of lumber sold by the plaintiff to the defendant. The answer was a general denial. The defendant also filed a declaration in set off, claiming a credit of \$50 as a commission for effecting the sale of the plaintiff's business as blacksmith and carriage-maker at Gardner, Mass. To this declaration in set off, the plaintiff filed a general denial. At the trial in the Superior Court before *Bishop, J.*, the defendant did not contest his liability for the price of the lumber; and upon the question of the plaintiff's liability for the commission claimed by the defendant, there was evidence tending to show that the plaintiff promised the defendant \$50 if he would find him a purchaser for his business, but reserved the right to sell the same by his own exertions; that the defendant endeavored to find a purchaser for the business, described it to sundry persons, at one time took one Bartlett, a resident of Newton, N. H., and at another time Bartlett and one Wentworth, also a resident of Newton, to Gardner to examine the shop and business, paying their expenses; that the defendant also endeavored to induce one Eaton, and one Sanborn, both residents of Amesbury, Mass., to buy the business, and informed them that Bartlett and Wentworth had been to Gardner, seen the shop, and could give them information about it; that the defendant requested Eaton to inform any person who might desire to purchase such a business, that the plaintiff's business was for sale; that Eaton went to Newton, N. H., and saw Bartlett and Wentworth about the business; that Eaton informed one Tuxbury that the plaintiff's business was for sale, that Tuxbury informed one Legro of the fact, and that Tuxbury and Legro went first to Newton, N. H., and talked with Bartlett and Wentworth about the business, and then went to Gardner, saw the plaintiff, and entered into negotiations with him which resulted in their purchase of the place. There was also evidence tending to show that the plaintiff had himself advertised in the Boston Globe that his business was for sale, and that Legro had stated to him that he saw

said advertisement; but this was denied by Legro, who was a witness at the trial, and testified that he first heard that the plaintiff's business was for sale from Tuxbury.

The defendant requested the judge to instruct the jury :

"If Gleason agreed to pay Nelson \$50 if the latter found him a customer for his place, or sold the place for him, Nelson is entitled to the promised commission if the jury are satisfied that the purchasers of the place obtained their knowledge that it was for sale from persons with whom Nelson had negotiated for its sale, and acting upon and by reason of that knowledge went to see the place, and as a result bought it of Gleason."

The judge declined to give this instruction, and, among other instructions, gave the following :

"If the person standing in the relation of Nelson brought the parties together, introduced them to each other, and then if by negotiations between the parties themselves afterwards they effected a sale, it is sufficient to entitle the man who brought the parties together to his commission, if he himself stood ready to do anything needed to effect the sale in addition afterwards. It is sufficient if the broker subsequently effects the sale by introducing the person to the owner, and by means of such introduction a person becomes the ultimate purchaser, if the broker is ready to do all that is necessary to effect the sale. . . . If the jury are satisfied that the defendant was the effective instrument and efficient cause of bringing about the sale by introducing these parties, or by bringing them together, then he is entitled to a commission. The defendant is not entitled to a commission if the sale was made to a party not introduced by him to the plaintiff. If it cannot be fairly said that the purchasers were introduced to the plaintiff by Nelson, he is not entitled to a commission; and he is not entitled to a commission unless he did the identical thing for which he was employed, which was to obtain a customer. If he did not obtain a customer, was not the means of doing it, he is not entitled to his commission. If he was the means of doing it, if he did obtain a purchaser, he is entitled to his commission, although he may not have stood by to carry out the purchase after the parties had been brought together. . . .

"The parties had some talk about what the defendant was to

do to sell the place. They had some talk about his advertising it. He did not advertise it, he says. But the plaintiff as well as the defendant went to work to sell the place, and the plaintiff did advertise it. Now the defendant saw various people who might become purchasers. He took two of them there, Bartlett and Wentworth, but for certain reasons they did not buy. Then he saw Eaton and talked with him about his buying the place, and he might have been a customer, but did not become one. And he said to Eaton, 'If you do not buy yourself, pray tell anybody who you may think possibly will want to buy this property about it, and send them to Bartlett and Wentworth, for they know all about it, having been there.' Meanwhile, the plaintiff himself was not idle, and presently there came to him these two men, Tuxbury and Legro, and they purchased of him. What was the efficient cause of bringing Tuxbury and Legro to the plaintiff to buy? What was the instrumentality which brought them there to buy? . . . Was it anything which Nelson did directly? . . . Or was it what the plaintiff himself did by his advertisement? Or was it by what we call an accidental finding out on the part of Tuxbury and Legro of the fact that this property was for sale, and then coming there without the intervention of either the plaintiff or the defendant? If it was the latter, if it came about without the direct agency of the defendant, he cannot recover his commission. If it came about through the instrumentalities of the plaintiff himself, either by his advertising, or by his interesting other people to purchase of him, then Nelson cannot recover his commission. In order to entitle him to his commission he must satisfy you by a fair preponderance of the evidence that what he did brought these parties together. What he did, as he says, is that he authorized, instructed, and employed Eaton to act in this matter; that Eaton found out Tuxbury and Legro, and set them on the track of this thing, and sent them to Bartlett and Wentworth, and then to the plaintiff, with whom the bargain was made. The plaintiff says it is not so. He says, whatever this man did with reference to anybody else becoming the purchasers through Eaton . . . was a general request or suggestion that Eaton should help him if he could, or interest persons if he could; but it was indefinite, and amounted to nothing, and

that what Eaton did amounted to nothing, and the plaintiff says he has produced evidence tending to show that Tuxbury and Legro got their first information from the advertisement put in the newspaper by himself, or by other means which he set in motion. Mere hearsay knowledge of the fact that he wished to sell his property, communicated to the buyer by a third person not employed by Nelson for the purpose, or authorized by him to make the communication, will not entitle him to a commission, although the customer came to the seller indirectly from Nelson. . . . Was Nelson the cause and instrumentality, the efficient or effective means of bringing these parties together? If so, he is entitled to his commission. But if you are satisfied that what the plaintiff himself did brought him a purchaser, the defendant is not entitled to a commission. If you think the reason why the purchasers came there was from the happening of events which took place without the agency of either the defendant or the plaintiff directly, then the defendant is not entitled to recover his commission."

At the close of the charge, the defendant's counsel called the judge's attention to the fact that the term "introduction," as used by him, might be taken by the jury to mean an ordinary personal introduction, and the judge added: "I do not mean a personal introduction, a physical personal introduction, where all the persons are present. I mean what is substantially and in reality an introduction, efforts that resulted in bringing the parties together."

The jury returned a verdict for the plaintiff for the full amount claimed in his declaration, without deduction for the defendant's alleged set-off; and the defendant alleged exceptions.

F. L. Greene, for the defendant.

S. T. Field, for the plaintiff.

ALLEN, J. The general rule of law applicable to a case like this is, that, where there has been no direct communication between the broker and the purchaser, it must be shown affirmatively that the latter was induced to enter into the negotiations which resulted in the purchase through the means employed by the broker for that purpose. If the broker employed other persons to aid him, whether under pay or not, or if he put up maps, signs, notices, or otherwise advertised the property, by

means of which a person was induced to open negotiations with the owner which resulted in his buying the property, the sale may be said to have been effected through the broker's instrumentality. But it must be made to appear that what the broker did was the immediate and efficient cause of such negotiations. If the broker merely talked about the property with different persons, and one of them of his own accord, and not acting in behalf of the broker, mentioned to another that the property was for sale, and such last mentioned person thereupon looked into the matter and finally became the purchaser, the agency of the broker in inducing the sale was not sufficiently direct to entitle him to a commission. *Ward v. Fletcher*, 124 Mass. 224. *Loud v. Hall*, 106 Mass. 404. *Bornstein v. Lans*, 104 Mass. 214. *Tombs v. Alexander*, 101 Mass. 255. *Sussdorff v. Schmidt*, 55 N. Y. 319. *Wylie v. Marine National Bank*, 61 N. Y. 415. *Earp v. Cummins*, 54 Penn. St. 394. *Carter v. Webster*, 79 Ill. 435.

The defendant relies on *Lincoln v. McClatchie*, 36 Conn. 136, as holding a rule rather more favorable to the broker. In that case the broker advertised the property; A. saw the advertisement, conferred with the broker, and went and told his friend B., in whose behalf he felt an interest, and B. bought the property. It was held that the broker was the procuring cause of the sale, and so was entitled to his commission.

The defendant's request for instructions was too broad. The purchasers may have obtained their knowledge that the plaintiff's business was for sale from a person with whom the defendant had negotiated for its sale, and yet that person might not have been acting as agent for the defendant, or in his behalf. The instructions given to the jury were sufficient to protect the defendant's rights, and fairly left it for the jury to determine whether the defendant was the cause, or instrumentality, or the efficient or effective means of bringing the purchasers and the seller together.

Exceptions overruled.

MATTHEW J. ANDERSON, JR. vs. HENRY DUCKWORTH
& another.

Hampden. September 25, 1894. — October 19, 1894.

Present: ALLEN, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

*Personal Injuries — Master and Servant — Due Care — Law and Fact —
Evidence — Exceptions.*

In an action for personal injuries occasioned to the plaintiff, while in the defendant's employ as an assembler of revolvers, by the explosion of a cartridge which had been accidentally left in one of the chambers of a revolver by the defendant, whose business it was to test the revolvers after the plaintiff had put them together, and, if they did not work well, to return them to him, and who told the plaintiff, when he first went to work, that he would see that no unexploded cartridge was left in the revolvers, it cannot be said, as matter of law, that the plaintiff should have examined the chambers of the revolver to see whether they contained an unexploded cartridge; or that, by continuing in the defendant's employ after finding, on a former occasion, an unexploded cartridge in a revolver returned to him by the defendant after testing it, he assumed the risk of an accident from such a cause; or that the manner in which the accident occurred showed that the plaintiff was careless; or that he should have used the safety catch on the revolver, the use of which would have prevented the accident; but all of these questions are for the jury.

In an action for personal injuries occasioned to the plaintiff while in the defendant's employ, it is competent for the judge, in the exercise of his discretion, to admit in evidence the whole of a conversation offered by the plaintiff for the purpose of showing an admission of liability on the part of the defendant, and in which reference was made by him to the fact that he was insured against accidents, with a caution to the jury that the fact of insurance is not to be taken as an admission by the defendant, and then in the charge, after saying again that the insurance is not to be regarded as an admission, to leave it to the jury to find, under suitable instructions, what the true import of the conversation was.

An exception will not lie, in an action for personal injuries occasioned to the plaintiff while in the defendant's employ, to the admission in evidence of a conversation between the plaintiff and the agent of an insurance company which had insured the defendant against accidents, if the bill of exceptions does not show that the defendant was not present at the conversation, or that the plaintiff's statement of what occurred was objected to except as a part of a conversation between the plaintiff and the defendant which was rightly admitted in evidence.

TORT, against Henry Duckworth and James Duckworth, copartners as H. and J. Duckworth, for personal injuries occasioned to the plaintiff, while in the employ of the defendants, by their alleged negligence. At the trial in the Superior Court,

• before *Fessenden*, J., the jury returned a verdict for the plaintiff; and the defendants alleged exceptions. The facts appear in the opinion.

J. B. Carroll, for the defendants.

D. E. Webster, for the plaintiff.

MORTON, J. The work which the plaintiff was employed to do was to assemble revolvers. That is, he took the different parts, after they were prepared, and put them together, and saw that they worked properly. It was no part of his duty to try them with explosives or to work on loaded revolvers. There was obviously nothing dangerous in handling revolvers under such circumstances. After the revolvers were assembled, they were tested by one of the defendants, James Duckworth, by loading and firing them, and if they worked all right they were accepted, but if they did not they were returned to the assembler. There was evidence tending to show that Duckworth told the plaintiff, when he first went to work, that he would see that no unexploded cartridge was left in the magazines. On the day of the accident, Duckworth, after testing one of the revolvers, handed it back to the plaintiff, telling him that it did not work right. While the plaintiff was engaged upon it, a cartridge which had been accidentally left by Duckworth in one of the chambers exploded and injured the plaintiff. The defendants contend that the plaintiff was bound, in the exercise of due care, to examine the revolver himself, and was not justified in relying wholly upon the examination of Duckworth, especially in view of the fact, which the plaintiff knew, that Duckworth once before had left an unexploded cartridge in a revolver, which he handed back to the plaintiff after testing it.

But due care depends on what is reasonable under the circumstances, and is generally a question of fact for the jury. It cannot be said, we think, as matter of law, that the probability that Duckworth would leave an unexploded cartridge in one of the chambers was so great as to require the plaintiff to examine them himself, or that, by continuing in the defendants' employment after finding an unexploded cartridge in a revolver handed to him by the defendant James after testing it, he thereby assumed the risk from such unexploded cartridges as might be accidentally left in revolvers by said James. He had a right

to rely to some extent upon James's assurance that he would leave no unexploded cartridge in the revolvers. How far it was reasonable for him so to do, under the circumstances, was a question for the jury. The defendants also contend that the manner in which the accident occurred shows that the plaintiff was careless, and that he should have used the safety catch. These questions were also for the jury. We do not think that it can be held, as matter of law, upon the evidence, that the plaintiff was wanting in due care because he did not use the safety catch, although if he had done so the accident would not have happened; nor that the manner in which the accident occurred appears so clearly as to justify us in saying that it must have been due to the plaintiff's carelessness, even if we assume that there was some reason for him to suppose that there might be an unexploded cartridge in the magazine.*

The remaining question relates to the admissibility of certain conversations between the plaintiff and the defendant James, introduced by the plaintiff for the purpose of showing what he contended was an admission of liability on the part of the defendants. Reference was made by the defendants in these conversations to the fact that they were insured against accidents. Before any of the testimony was introduced, the plaintiff's counsel, upon objection by the defendants' counsel, said, without stating the precise testimony, that he expected to show an admission by the defendants. The court thereupon stated that "no evidence could be considered by the jury except such as showed an admission, and that no evidence as to an insurance by the defendants would be competent to show an admission." The same statement was made by the court with reference to testimony relating to insurance drawn out of the defendant James on his cross-examination. Both of these statements were ad-

* The plaintiff's testimony as to the occurrence of the accident was as follows: "The revolver was all put together when he handed it to me; I walked over to my bench and sat down, and was about to raise my left hand to take off the cap and see what the matter was, when it slipped, and I suppose I squeezed my hand on it to keep it from falling, and it went off and shot me in the hand, — in my left hand. I started to take off the pin for the purpose of taking out the inside and seeing what was the matter; it shot me in the forefinger of my left hand."

dressed, it is to be presumed, to the jury. In its charge, the court told the jury, in substance, that the fact of insurance had nothing to do with the duty of the defendants to the plaintiff or their liability to him, and that it was for them to say whether the true import of the conversations was an admission of liability on the part of the defendants, or an assurance or the expression of a hope on their part that the insurance company would pay the plaintiff, and that if it was the latter it was not an admission. No exception appears to have been taken by the defendants to this portion of the charge. And we think that it was competent for the court, in the exercise of its discretion respecting the conduct of the trial, to admit the conversation, with a caution to the jury that the fact of insurance was not to be taken as an admission by the defendants; and then in the charge, after saying again that the insurance was not to be regarded as an admission, to leave it to the jury to find, under suitable instructions, what the true import of the conversation was. It cannot be said, we think, that there was nothing which fairly could be construed as an admission of liability.

The exceptions do not show that the defendant James was not present at the conversation with the agent of the insurance company, or that the plaintiff's statement of what occurred was objected to, except as a part of the conversation with the defendant.

Exceptions overruled.

**FLORENCE J. MCCARTHY, administrator, vs. METROPOLITAN
LIFE INSURANCE COMPANY.**

Hampden. September 25, 1894. — October 19, 1894.

Present: ALLEN, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Life Insurance — Right of Administrator of Assured to sue — Action.

A policy of insurance, not under seal, was issued to A. upon his life, in which the insurance company agreed to pay to the person or persons designated in the fifth condition of the policy, upon receipt of proofs satisfactory to the company of the death of the insured, a certain sum of money. The fifth condition was as follows: "The production by the company of this policy, and of a receipt for

the sum assured, signed by any person furnishing proof satisfactory to the company that he or she is an executor or administrator, husband or wife, or relative by blood, or lawful beneficiary, of the insured, shall be conclusive evidence that such sum has been paid to and received by the person or persons lawfully entitled to the same, and that all claims and demands upon said company under this policy have been fully satisfied." B. was named as the beneficiary in the application for the insurance made by A. *Held*, that the administrator of A.'s estate could maintain an action on the policy.

CONTRACT, by the administrator of the estate of Ellen McCarthy, upon a policy of insurance for \$500, issued by the defendant to her upon her life. At the trial in the Superior Court, before *Fessenden, J.*, the jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion.

E. H. Lathrop, for the defendant.

J. B. Carroll, for the plaintiff.

LATHROP, J. The defendant in this case, after an application in writing made by Ellen McCarthy, issued to her a policy of insurance upon her life, in which it agreed to pay to the person or persons designated in the fifth condition of the policy, upon receipt of proofs satisfactory to said company of the death of the insured, a certain amount of money. The fifth condition reads as follows: "The production by the company of this policy, and of a receipt for the sum assured, signed by any person furnishing proof satisfactory to the company that he or she is an executor or administrator, husband or wife, or relative by blood, or lawful beneficiary, of the insured, shall be conclusive evidence that such sum has been paid to and received by the person or persons lawfully entitled to the same, and that all claims and demands upon said company under this policy have been fully satisfied." In the application made by Ellen McCarthy, under the heading, "Name, etc. of person to whom benefit is to be paid," is written "Florence McCarthy, nephew."

This case is an action on the policy brought by the administrator of the estate of Ellen McCarthy. At the trial, the defendant asked the court to rule that the plaintiff could not maintain the action, and that the beneficiary named in the contract was the only person entitled to sue. The court declined so to rule; and the case comes before us on the defendant's exceptions.

If the policy in this case had been under seal, it is clear that the plaintiff would be the only person entitled to maintain the action. *Campbell v. New England Ins. Co.* 98 Mass. 381, 400. *Bailey v. New England Ins. Co.* 114 Mass. 177. *Flynn v. North American Ins. Co.* 115 Mass. 449. *Rindge v. New England Aid Society*, 146 Mass. 286, 289.

The policy here does not purport to be sealed, the language of the final clause being, "In witness whereof, the said Metropolitan Life Insurance Company has, by its president and secretary, signed and delivered this policy." There is, however, a facsimile of the seal of the corporation printed upon it. If this was done at the time the blank form of policy was printed, it is not a good seal. *Dean v. American Legion of Honor*, 156 Mass. 435, 436.

Treating the policy, therefore, as one not under seal, and assuming that the persons named in the fifth condition are named distributively, the defendant contends that this is a simple contract made by the intestate with the defendant, by which it agreed only to pay to the lawful beneficiary, and that therefore the action should have been brought by the beneficiary.

But the promise to pay to the beneficiary was made by the defendant with the intestate, and not with the beneficiary. *Nims v. Ford*, 159 Mass. 575. Whether the beneficiary could or could not sue upon this contract, is immaterial, if the plaintiff could sue, and we see no reason why he could not maintain an action upon a promise made to his intestate.

Exceptions overruled.

MARY CRONIN vs. CITY OF HOLYOKE.

Hampden. September 25, 1894. — October 19, 1894.

Present: ALLEN, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Defective Sidewalk — Instructions to Jury — Submission of Special Question to Jury.

In an action against a city for personal injuries occasioned by slipping upon ice on a sidewalk, the plaintiff's evidence tended to show that the ice was rough, and the defendant's that it was smooth. Upon the evidence reported to this court, it appeared that unless the ice was rough the plaintiff could not recover in any event. The jury found for the defendant, thus negating the view that the ice was rough. *Held*, that the plaintiff was not injured by a refusal to give certain instructions requested by her, founded on the assumption that the jury might find the ice to have been smooth, since in no case could she recover if the ice was smooth.

At the trial of an action against a city for personal injuries occasioned by falling upon ice on a sidewalk, the judge submitted to the jury the following question, "Was there an imperfect construction of the sidewalk?" The jury, who returned a general verdict for the defendant, did not answer the question, and no answer was required by the judge or requested by either party. *Held*, that there was no error in the course of the judge in submitting the question to the jury; and that it could not be seen that the plaintiff was harmed thereby.

TORT, for personal injuries occasioned to the plaintiff by an alleged defect in a highway called Sargeant Street, in the defendant city. At the trial in the Superior Court, before *Fessenden, J.*, the jury returned a verdict for the defendant; and the plaintiff alleged exceptions, which appear in the opinion.

C. T. Callahan, for the plaintiff.

W. Hamilton, (*W. H. Brooks* with him,) for the defendant.

ALLEN, J. This case comes before us on exceptions to the omission of the presiding justice to give certain instructions requested by the plaintiff.

The plaintiff was injured by slipping upon ice on a sidewalk. The plaintiff's evidence all went to show that the ice was rough, uneven, and hubbly at the place of the accident. The jury, it would seem, negated this view. The defendant's evidence went to show the following state of facts, viz.: that the sidewalk descended four feet in fifty in going to the east; that opposite to the place of the injury a building thirty-two feet wide had its front on the sidewalk; that westerly of the building

there was a vacant lot of land fronting upon and sloping towards the sidewalk, which land was covered with snow; that water from the melting snow flowed from the lot at the corner of the building upon the sidewalk, and afterwards froze there; that on the morning of the day of the accident there was a strip of thin slippery ice, about one eighth of an inch thick, which extended lengthwise down the inside (that is, the northerly side) of the sidewalk, from a point near the corner of the building to the intersection of the next street; that this strip of ice was about five or six inches in width at the westerly end, and gradually increased in width as it ran down the hill till it measured about eighteen inches in width at the easterly end; and that this strip of ice was formed by water from melting snow on the vacant lot, which trickled down the sidewalk and froze.

The plaintiff disputed these facts, and introduced evidence tending to show that the water would not naturally flow from the vacant lot to and upon the sidewalk. The plaintiff's purpose apparently was to negative the defendant's theory of a thin strip of ice, and to support her own theory of an accumulation of uneven, rough ice upon the sidewalk, which it was assumed, on all hands, might be found to constitute a defect. And the plaintiff admitted that the sidewalk was "a perfect sidewalk," which we suppose means perfect in its construction.

But notwithstanding this admission, the plaintiff presented her requests for certain instructions, which were founded on the assumption that the jury might accept the defendant's view of the sidewalk.* The judge, however, gave no instructions upon

* The instructions requested were as follows:

"1. If the sidewalk was so constructed as to induce the formation of ice upon it as a result of water made by melting snow flowing upon it from an embankment running along the walk, and ice did form on said walk as a consequence of such construction at the place alleged, and the city, by the exercise of reasonable care and diligence, could have prevented the water from so flowing, such formation of ice would be a defect for which the city would be liable even if the ice so formed were smooth and slippery.

"2. If the presence of snow upon the vacant lot west of Shea's building caused the flowing of water upon the sidewalk and the formation of ice thereon, and such causing was known to the defendant, or ought to have been known to it, and by the exercise of reasonable care and diligence could have been prevented, the defendant would be liable."

the subjects of the plaintiff's requests, and left it to the jury to determine whether there was a want of repair, either from an accumulation of rough, uneven ice or snow, or arising from the imperfect construction of the sidewalk; giving no explanation as to what would constitute imperfect construction.

We do not, however, think the plaintiff suffered from this omission, because upon the case as it stood there was no sufficient evidence that the sidewalk was defective or out of repair, unless by reason of an accumulation of rough ice upon it. There was no suggestion that the place was improper or dangerous for a sidewalk to be built. It was on one of the streets of the city, and, in the absence of evidence to the contrary, we must assume that it was proper, if not necessary, to have a sidewalk there. It is not suggested that it was not built at a proper height. The admission of the plaintiff that it was a perfect sidewalk precludes us from doubting that it was. In going to the east it descended four feet in fifty. This clearly is not a dangerous or an unusual slope. There was nothing, then, in its construction to induce the flow of water upon it from the vacant lot, except the fact that the lot stood higher and sloped towards the street. The place where the plaintiff received her injury was not opposite to the vacant lot, nor at the corner of the building; it was opposite to the building, and may have been, and probably was, twenty-five or thirty feet away from the place where the water came upon the sidewalk, since the plaintiff, in her notice to the city, describes the place as "just west of the conjunction of Sargeant Street and Commercial Street."

There is nothing set out in the bill of exceptions which shows that the jury could find a defect in the sidewalk at the place of the plaintiff's injury by reason of the existence of the smooth ice described by the defendant's witnesses; and if there was no other evidence than that which has been shown to us, the judge might well have instructed the jury that the plaintiff was not entitled to recover unless they should adopt her view that she fell by reason of an accumulation of rough ice. See *Stanton v. Springfield*, 12 Allen, 566; *Nason v. Boston*, 14 Allen, 508; *Luther v. Worcester*, 97 Mass. 268; *Billings v. Worcester*, 102 Mass. 329; *Pinkham v. Topsfield*, 104 Mass. 78; *Street v. Holyoke*, 105 Mass. 82; *Fitzgerald v. Woburn*, 109 Mass. 204;

Spellman v. Chicopee, 131 Mass. 443; *Adams v. Chicopee*, 147 Mass. 440; *Hughes v. Lawrence*, 160 Mass. 474.

The judge might, in his discretion, submit the special question to the jury, as he did.* But they did not answer it, and no answer was required by the court, or requested by either party; so the whole idea of submitting a special question went for nothing. We cannot see that the plaintiff was harmed by this course.

Exceptions overruled.

MARY BRADY vs. MICHAEL J. FINN.

Hampshire. September 26, 1894. — October 19, 1894.

Present: ALLEN, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Deceit — Declaration — False Representations — Law and Fact — Evidence — Discretion of Court.

The declaration in an action for deceit alleged, in substance, that the plaintiff was induced to exchange her property, consisting of a parcel of land with a dwelling-house thereon, for the defendant's farm and the personal property thereon, by the latter's representations as to the advantageous situation and fertility of the farm and the value of the buildings, cattle, implements, and products thereon, all of which were enumerated; that these representations were false, "all of which the defendant well knew"; that the plaintiff had known and dealt with the defendant for many years, and placed great confidence in him as a reliable business man; that the plaintiff told the defendant that she did not know where his farm was located, and he promised to take her there, but, upon being asked so to do on three different occasions, he offered certain excuses for his inability to perform his promise, and finally told her that, after the deeds were given, he would show her the farm; "that, by such evasions and delays, and by telling her that she could trust him, and in the mean time must not speak to any one about the proposed purchase, because there were one or two persons who would insist on buying the farm if they knew it was for sale, the defendant fraudulently induced her to forbear examining the farm and personal property and making inquiries about them, as she otherwise would have done; and that, in pursuance of the same fraudulent intent to deceive and injure her, the defendant so pressed her to complete the exchange of property that the whole business was completed on the second day after it was suggested to her by the defendant, so that she had no time to examine or inquire about said property." *Held*, that the declaration, not having been demurred to, was sufficient to support a verdict for the plaintiff.

* The question was as follows: "Was there an imperfect construction of the sidewalk?"

In an action for deceit in the sale of a farm, the evidence tended to show that the farm, though in the same town where both parties lived, was in a remote part thereof, with which the plaintiff was unacquainted; that she proposed on three occasions to the defendant to take her there, and he promised so to do on some subsequent day, and put her off on various pretences; that he hurried the matter to completion within forty-eight hours, and thus deprived the plaintiff of time for inquiry and examination; and that the plaintiff was justified by the defendant's position in life and her long acquaintance with him in reposing confidence in his statements. *Held*, that the court could not say, as matter of law, that the plaintiff was so careless in trusting the defendant, and in not examining the farm before taking a deed thereof, that she should be precluded from recovery; and that the question of her negligence was properly submitted to the jury.

An exception to the admission of evidence, which it was within the discretion of the judge to admit when offered, although it might have been excluded until further testimony had been put in, cannot be sustained, if, no such testimony having been introduced, the excepting party, at the close of the evidence, did not request that the evidence objected to be stricken out, and the jury instructed to disregard it.

TORT, for deceit. The amended declaration alleged that the defendant induced the plaintiff to exchange a parcel of land, with a dwelling-house thereon, situate in Holyoke, which she owned, and which was fairly worth \$2,500 over and above all encumbrances, for a farm of his situate in Holyoke, together with ten cows, a pair of horses, five hundred bushels of potatoes, four hundred bushels of corn, and all the tools, vehicles, and other articles of personal property then on the farm and necessary for carrying on the farm, and, in further payment for the farm and personal property, induced her to give him a mortgage of the farm to secure the payment of \$2,500, with interest; that to induce her to make such purchase and conveyance, and to execute and deliver such mortgage, the defendant falsely represented to her that the farm and personal property were together worth \$5,000, that the land of the farm was rolling, and every portion of it could be ploughed except the woodland, that there was a good pasture, in which he had kept fifteen cows through the preceding summer, that there were twelve hundred cords of wood standing on the farm, worth \$2,000, that there was a good road, and not very hilly, over which a good load could be drawn, between the farm and Holyoke, that there were a good habitable house, a new barn, and good outbuildings on the farm, that the farm was situated on a road where there was much passing, that there were ten first-class picked cows

to go with the farm, each worth fifty dollars, that there was a pair of sound horses on the farm, worth \$500, that the vehicles, farming tools, and other implements which were to go with the farm were new and little used, and that there were five hundred bushels of potatoes and four hundred bushels of corn on the farm and to be sold with it; that these representations were false, "all of which the defendant well knew"; that for many years the plaintiff had known the defendant as a prosperous business man of Holyoke; that she had dealt with him weekly all that time, and had come to regard him as a reliable business man, in whom she placed great confidence; that he sent for her and proposed to sell her the farm, representing that he wished to do her and her husband a favor by giving them a great bargain; that she asked him where the farm was, and he said it was in West Holyoke; that she told him she did not know where West Holyoke was; that he said he would take her there any day; that she said she would go right away, and he said he could not take her then because his horses were all busy; that at a subsequent interview she asked him to take her to the farm, and he made a similar reply; that at their final interview she asked again to be taken to see the farm, and he said, "Wait until after the deeds are given, and I will show you the farm"; that by such evasions and delays, and by telling her that she could trust him, and in the mean time must not speak to any one about the proposed purchase, because there were one or two persons who would insist on buying the farm if they knew it was for sale, the defendant fraudulently induced her to forbear examining the farm and personal property and making inquiries about them, as she otherwise would have done; and that, in pursuance of the same fraudulent intent to deceive and injure her, the defendant so pressed her to complete the exchange of property that the whole business was completed on the second day after it was suggested to her by the defendant, so that she had no time to examine or inquire about the property. Answer, a general denial.

Trial in the Superior Court, before *Sherman, J.*, who allowed a bill of exceptions, in substance as follows.

The plaintiff offered evidence tending to show, among other things, that in February, 1892, she was the owner of a house

and lot of land in Holyoke, fairly worth \$2,800 and subject to a mortgage for \$300; that she and her husband, John Brady, had lived in Holyoke for more than twenty years; that for some thirteen years she had known the defendant and dealt with him at his grocery store; that the defendant was a man of wealth, and had always treated her in a manner to win her confidence; that in February, 1892, she was informed that the defendant had a farm which he wished to sell and would like to see her about it; that on February 22, 1892, she went accordingly to see the defendant at his store; that the defendant said, "I have a good farm for you, and as good as any one you will find in the State, for a small price and well stocked"; that the defendant said this farm was in West Holyoke; that she said that she did not know where West Holyoke was, and the defendant said, "You won't leave Holyoke"; that she said, "I would like to see the farm now"; that the defendant said, "I and the horses are too busy now, but I will take you out some day, — come to-morrow morning with your husband, and we will close the trade, — be sure and do not tell anybody, for another party wants it"; that early the next morning she and her husband went to the defendant's store, and Brady asked him where the farm was, and the defendant answered in West Holyoke; that Brady then asked where the place called West Holyoke was; that the defendant said it was in Holyoke, about four and a half miles away, and that he would take him out some day; that Brady said, "I want to see it right off," and the defendant answered, "My horses are too busy to go to-day"; and that Brady thereupon said, "Are you trying to cheat me?" and the defendant replied, "No, you can trust me." The plaintiff further offered evidence tending to show that the defendant then stated that there was a pretty fair house on the farm, of six or seven rooms, and with a lawn around it, that there was a first-class barn, with new wings to it, that everything in the line of vehicles and farming tools and implements needed on the farm went with it, all new or nearly so, that there were four hundred bushels of potatoes and four hundred bushels of corn, and all the hay the plaintiff would need, to be sold with the farm, that included in the sale were ten picked cows worth fifty dollars apiece, and a pair of first-class horses worth five hundred dollars, that there was a pasture which could carry fifteen cows through

the season and would keep ten nicely, that the land of the farm was rolling, and every acre except the woodland could be ploughed, that there were twelve hundred cords of wood standing on the farm and worth \$2,000, that the location was not a lonesome one, but beside a much-travelled road, that the road to Holyoke, where the principal market would be, was a good one, not very hilly, but one over which an ordinary horse could draw a good load, and that the farm, with the personal property upon it, was worth more than \$5,000, but the plaintiff should have it for that price; that it was agreed that the plaintiff's house and lot, subject to the mortgage, should be taken by the defendant at \$2,500, in part payment for the farm, and that the plaintiff should mortgage the farm to the defendant for \$2,500 and interest; that the defendant told the plaintiff to come with her husband the next morning and have the papers made out; that the plaintiff asked why the defendant wanted to hurry the business through so, and he said, "There are other parties after it, and if you take it it must be finished at once, for if I sell to them I can get a bigger price, but I want to give you the benefit, and you can trust me"; that the defendant told them not to tell any one that they were going to buy the farm; that on the next morning the plaintiff and her husband went to the defendant's store, and the plaintiff said, "I want to see the farm before I buy it"; that the defendant said one of his horses was sick and she must wait until his business was more quiet, when he would take them over and they would find everything just as he had said; that thereupon they went with him to a lawyer's office, where the deeds and mortgage as were agreed were drawn, executed, and delivered; that thereafter, as they were going down stairs from the lawyer's office, the defendant said, "Now you can tell any one you please about the farm"; that up to this time they had not made any inquiries about nor any attempt to examine the farm, owing to the defendant's cautions against doing so and their entire confidence in him and his statements; that, after the deeds had been delivered, the plaintiff several times asked the defendant to show her the farm, but it was not until some two weeks after that he did so; that when she saw the place she exclaimed, "Mr. Finn, give me back my little home!" and he said, "A bargain is a bargain"; that the house and the barn were in a dilapidated condition; that the vehicles and farming implements and tools were

old and of small value; that the cows were not worth fifty dollars apiece, and were not a picked lot, but poor "milkers" and of small value; that the pair of horses was not first-class nor worth five hundred dollars, but one horse was foundered and not worth sixty dollars, and the other was subject to colic and worth about eighty dollars; that there were not over two hundred bushels of potatoes and only from one hundred to two hundred bushels of corn; that a large part of the farm was on the side of a mountain, and not over twelve or fifteen of its one hundred acres could be ploughed; that the pasture was hilly and barren, and could not carry the ten cows for half of the season; that there were not over two hundred and fifty cords of wood standing on the farm, and that was in places so difficult of access as to be practically worthless; that the location of the house was lonesome, and the road beside which it stood was little travelled; that the road to Holyoke was in large part over a mountain, the first stretch of three quarters of a mile above the farm being so steep that no horse could draw an ordinary load up it, and teamsters were accustomed to throw off parts of ordinary loads and make two trips to carry a load up; that this steep road diminished the value of the farm; that the farm and buildings were not fairly worth \$2,000; and that the personal property altogether was not worth \$500.

The defendant introduced evidence tending to show that the plaintiff came to his store to purchase a farm; that he told her he had a good farm in West Holyoke, about four and a half miles from Holyoke, a good pair of farm horses, ten good cows, a pretty fair house, good barns, plenty of wood, and hay and grain on it, plenty of farming tools and implements, altogether worth \$5,000; that he asked the plaintiff if she would not like to see the farm, and she said it was not necessary; that another time she said "they knew all about it" (the farm); and that the trade was not consummated on the third day from the first talk, but after a long lapse of time.

The sale between the parties was made on or about February 24, 1892. The plaintiff offered a deed of the premises, setting out a foreclosure sale thereof on May 20, 1893, and showing what the premises then brought, as evidence of the value of the farm in February, 1892. To the admission of this evidence the defendant objected, because no evidence had been introduced

showing the relative condition or value of the farm land and buildings in February, 1892, and May, 1893. The judge admitted it; and the defendant excepted.

At the close of the evidence, the defendant asked the judge to rule that, upon the evidence and the pleadings, the plaintiff could not recover. The judge refused so to rule; and the defendant excepted.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

A. L. Green, for the defendant.

R. O. Dwight, for the plaintiff.

LATHROP, J. The amended declaration in this case is inartificially drawn, but it was not demurred to, and we are of opinion that it sets forth a cause of action with sufficient precision to support a verdict. Fraud is undoubtedly the gist of the action, and in some form must be alleged and proved. The declaration sets forth certain facts to have been stated by the defendant, and their falsity, and also alleges the defendant's knowledge of their falsity. See *Litchfield v. Hutchinson*, 117 Mass. 195; *Holst v. Stewart*, 154 Mass. 445. The representations made were of material facts which were susceptible of knowledge; and the fraudulent intent of the defendant was an inference which the jury was entitled to draw. *Collins v. Denison*, 12 Met. 549.

The question of most difficulty in the case arises from the fact that the misrepresentations were concerning facts, the truth or falsity of which could have been ascertained by the plaintiff had she gone to the farm before taking a deed thereof. The general rule undoubtedly is "that one bargaining with another must use reasonable diligence to discover for himself facts obvious to an ordinary observer, of which the means of knowledge are equally available to both parties"; and that, if he fails to do this, he cannot maintain an action of deceit for the misrepresentation of them. *Holst v. Stewart*, 161 Mass. 516, per Knowlton, J. In the same case, however, it was said: "But in the application of this rule the circumstances of each case should be considered to determine whether the plaintiff has been guilty of such inexcusable negligence as should preclude him, under a general rule of public policy, from having a remedy against one who has fraudulently abused his confidence." And

in that case it was held, on the circumstances, that the court could not say, as matter of law, that the plaintiff was so careless in trusting the person making the representation that he should be precluded from recovering.

In the case at bar the jury would have been warranted in finding that the farm which the plaintiff was induced to buy, though in the same town where she and the defendant lived, was in a remote part thereof, with which she was unacquainted; that she proposed on three occasions to the defendant to take her there, and he promised to take her on some subsequent day, but put her off on various pretences; that he hurried the matter to completion within forty-eight hours, and thus deprived the plaintiff of time for inquiry and examination; and that she was justified by the defendant's position in life and her long acquaintance with him in reposing confidence in his statements. The facts are certainly as strong in this case as in *Holst v. Stewart* for departing from the general rule, and in submitting the question of the plaintiff's negligence to the jury.

The remaining question is as to the admissibility of the evidence of the sale of the property, fifteen months after the conveyance to the plaintiff, under a foreclosure of a mortgage. The fact that the sale was made so long after the purchase by the plaintiff does not render the evidence incompetent. *Roberts v. Boston*, 149 Mass. 346, 354. The value of the testimony depended largely, if not entirely, upon the relative condition of the farm and buildings at the time of the purchase by the plaintiff and at the time of the sale, and such evidence is usually introduced. *Brigham v. Evans*, 113 Mass. 538. *Croak v. Owens*, 121 Mass. 28. The only exception of the defendant to the admission of the evidence is, that no testimony had been introduced showing the relative condition or value at the different times. While the presiding justice might have excluded the evidence until further testimony had been put in, we are of opinion that it was within his discretion to admit the evidence of the sale at the time it was admitted; and at the close of the evidence, if no testimony had been put in bearing upon the relative condition or value, the defendant might then have requested that the evidence of the sale be stricken out, and the jury instructed to disregard it. This the defendant did not do; and the order must be,

Exceptions overruled.

RICHARD H. VAN DEUSEN vs. B. FRANK STEELE.

Hampden. September 26, 1894. — October 19, 1894.

Present: ALLEN, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Exceptions — Contract — Demand — Tender.

A point not taken at the trial is not open upon a bill of exceptions.

An agreement, signed by the defendant, certified that he had sold to the plaintiff certain mortgage bonds, one of them being called the "W. bond," by which the defendant agreed to take back the same bonds on thirty days' notice, the plaintiff paying him a certain commission. In an action thereon, there was evidence that, in January, 1890, the plaintiff took to the defendant a letter which he had received from a loan company, stating that the mill on W.'s land had been burned, and that the insurance company refused to pay. The plaintiff testified that he delivered the "W. bond" to the defendant, and said to him: "I have brought this bond back to you, and I am glad it has so happened that I have a good backer that is able to pay for them and do as he agreed. This bond I bought of you to be paid in thirty days. I deliver it and shall expect you to pay it back according as agreed." The defendant denied that any demand was made upon him; and his testimony tended to show that he received the bond to collect for the plaintiff. The judge, who tried the case without a jury, refused to rule as requested by the defendant, that "the evidence being undisputed that at the time the plaintiff took to the defendant the letter of January 6, 1890, and the W. bond, no commission was tendered the defendant, and no demand made that the defendant should receive and pay for the said bond, no demand and tender, as contemplated by the contract, was made"; and found for the plaintiff. *Held*, that the ruling requested was rightly refused; and that the plaintiff's testimony was sufficient to authorize a finding that a demand was made. *Held, also*, that, a formal tender having been made to the defendant of the amount of his commission more than thirty days before the date of the writ, if any tender was necessary, the fact that it was not made in January, 1890, was immaterial.

LATHROP, J. This is an action of contract upon an agreement, dated February 14, 1889, signed by the defendant, which certified that the defendant had on that day sold to the plaintiff certain mortgage bonds, being four in number, and one of them called the "F. C. Wiant bond," for \$2,500, by which the defendant agreed to take back the same bonds on thirty days' notice, the plaintiff paying the defendant a commission of one per cent. The writ is dated January 16, 1891.

The case was tried by a justice of the Superior Court, without a jury, who found and ordered judgment for the plaintiff; and

the case comes before us on the defendant's exception to the refusal of the justice to give the following ruling: "The evidence being undisputed that at the time the plaintiff took to the defendant the letter of January 6, 1890, and the Wiant bond, no commission was tendered the defendant, and no demand made that the defendant should receive and pay for the said bond, no demand and tender, as contemplated by the contract, was made."

At the argument the defendant contended that the contract was an entire one, and that the plaintiff could not maintain the action without delivering back all the bonds and tendering the commission provided for. This point, however, is not open to the defendant. The ruling asked for clearly relates to the Wiant bond alone, which was the only one in dispute between the parties at the trial, the defendant having paid the plaintiff for the other three bonds in March, 1890. There was also evidence that in January, 1890, the defendant agreed to take back these three bonds and to pay for them. The case, therefore, stands as if the agreement had been made in relation to the Wiant bond alone.

As to this bond there was evidence that, on January 11, 1890, the plaintiff took to the defendant a letter which he had received from the Kansas National Loan Company, stating that the mill on Wiant's land had been burned, and that the insurance company refused to pay. The plaintiff testified that he delivered the bond to the defendant, and said to him: "I have brought this bond back to you, and I am glad it has so happened that I have a good backer that is able to pay for them and do as he agreed. This bond I bought of you to be paid in thirty days. I deliver it and shall expect you to pay it back according as agreed."

The defendant did not deny receiving the bond, but he denied that any demand was made upon him; and his testimony tended to show that he received the bond to collect for the plaintiff.

The question of fact thus presented was decided against the defendant; and the testimony of the plaintiff was sufficient to authorize a finding that a demand was made.

The request for a ruling which was based on the statement that no demand was made on January 11, 1890, was, therefore, rightly refused.

As to the question of tender which is raised by the request for the ruling above stated, while it is true that no tender was made in January, 1890, a formal tender was made to the defendant of the amount of his commission on December 13, 1890; which was more than thirty days before the date of the writ, and a formal demand made upon him at the same time. If, therefore, any tender was necessary, the fact that it was not made on January 11, 1890, was immaterial. *Exceptions overruled.*

E. H. Lathrop, for the defendant.

E. P. Kendrick, for the plaintiff.

MARGARET C. MOYNIHAN vs. SAMUEL B. ALLYN.

Hampden. September 26, 1894. — October 19, 1894.

Present: ALLEN, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Landlord and Tenant — Defective Condition of Tenement — Action.

An action cannot be maintained against the owner of a house let in tenements for personal injuries occasioned to a child of a tenant by reason of the defective condition of a platform attached to the rear of the house, and used in common by the tenants thereof, if the platform was in the same condition at the time of the accident in which it was when the tenement was hired by the plaintiff's father, who could have discovered its condition upon reasonable examination, and which condition was known to the plaintiff's mother, who had used the platform frequently.

TORT, for personal injuries occasioned to the plaintiff by a defect in a platform connected with a building owned by the defendant in Holyoke. Trial in the Superior Court, before *Mason, C. J.*, who allowed a bill of exceptions in substance as follows.

It was admitted that the defendant owned the premises in question, and that the relation of landlord and tenant existed between the defendant and the plaintiff's father.

The plaintiff's evidence showed that the plaintiff was a minor at the time of the injury complained of, a little less than four years old, and was living with her father and mother; that

some two months before the injury the father hired a tenement in the defendant's building, which was four stories high and contained four or more tenements; that there were common hallways and staircases running up from the first floor to the fourth floor used by all the tenants, and an entrance at either end of the hall on the first floor, the hall extending through the building; that the entrance from an alley in the rear of the building was by a flight of stairs leading up to the hallway door; that from the top of this flight of stairs there was a plank walk about fifteen feet long and three feet wide, with a railing connecting with a platform, which platform was built and used as a place for the tenants in the block to hang out washing to dry, and the plank walk was made and used for the sole purpose of reaching the platform; and that the platform, walk, and top step were all about ten feet from the ground, and the walk and platform had a railing around their sides, which slightly overhung the edge of the platform.

The plaintiff's father testified that he did not specially examine the platform, and could not say whether he had been on it before the accident or not.

The plaintiff's mother testified that she had been on the platform many times; that it was rotten, but that it had never broken through with her, and had always held her up; that the platform was used by all the tenants as a place for hanging out clothes, and was used for no other purpose; and that on the day of the accident she was at work in her kitchen, and had left the plaintiff in another room, playing with another little child.

There was evidence tending to show that the plaintiff was found near the stairs; that the ground was muddy, and below the edge of the platform, where the rail overhung, were marks on the ground of a body falling, and there were tracks and marks from there to where the child was found of one dragging himself along; that on the ground beside the spot above mentioned as indicating a body falling was a piece of broken plank, and just above was another piece of broken plank sagging down, but holding to the main piece at one end; that the break was at the outer edge of the platform, and the plank projected several inches from the side of the shed, the platform being the roof of the shed; that the appearance of the broken part indicated a

recent break; that the part broken off was some five or six feet long, about four inches wide in the middle, tapering to the ends; that about half of this broken piece was on the ground, and half sagging down; and that the plank and pieces had a very rotten appearance.

The evidence was uncontradicted that the platform was in the same condition at the time of the hiring of the tenement as at the time of the injury.

At the close of the plaintiff's evidence, the judge, at the defendant's request, directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions.

A. L. Green, for the plaintiff.

W. H. Brooks, for the defendant.

MORTON, J. The evidence was uncontradicted that the platform was in the same condition when the accident to the plaintiff occurred in which it was when her father, of whose family she was a member, hired the tenement. The duty of the defendant was, to use due care to keep the platform and common passageways in a condition as good as they were at the time of hiring, and to inform the tenant of any hidden defect which could not be discovered by reasonable diligence on his part, and of which the defendant ought for his proper protection to be informed. *Woods v. Naumkeag Steam Cotton Co.* 134 Mass. 357. *Bowe v. Hunking*, 135 Mass. 380. *Quinn v. Perham*, 151 Mass. 162. *Martin v. Richards*, 155 Mass. 381. *Booth v. Merriam*, 155 Mass. 521. *Bertie v. Flagg*, 161 Mass. 504. There is nothing to show that the injury to the plaintiff was due to any neglect of this duty on the part of the defendant. The plaintiff's father hired the tenement as it was, and with such conveniences as went with it. The condition of the platform could have been discovered by him by reasonable examination. His wife testified that she had been on it many times, and that it was rotten; and it does not appear that there was any such change in its condition as to impose on the defendant a duty to repair it.

As this view is decisive against the plaintiff's right to recover, it is unnecessary to consider the other questions which the case presents.

Exceptions overruled.

THOMAS COLLINS vs. JAMES GREELEY.

Hampden. September 26, 1894. — October 19, 1894.

Present: ALLEN, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Argument to Jury — Improper Influence — Instructions.

At the trial of an action the plaintiff's counsel in his closing argument made certain observations from which it might be inferred that improper influence had been brought to bear on the jury, but there were no suggestions or intimations during the trial of anything on which they could be based. The defendant's counsel asked the judge to instruct the jury that there was no evidence to justify the use of the language, that it was uncalled for, and that they should give it no weight. The judge declined so to instruct the jury, but gave instructions which covered those requested, and told them in substance that they were to decide the case upon the law and the evidence, and nothing else. *Held*, that the defendant had no ground of exception.

TORT, for assault and battery, the only question tried being the amount of damages.

At the trial in the Superior Court, before *Fessenden, J.*, the plaintiff's counsel, in his closing argument to the jury, used the following language: "I don't care if the atmosphere of the corridors of the court-house has been palpitating with suggestions about this case. I don't care if there are friends of the defendant on the jury, or friends of his friends, or if there have been sibilant whisperings about the court-room concerning this case. Such things should not have any influence upon your deliberations or conclusions in this case, and I do not believe they will have any influence."

There was no evidence, nor any suggestion or intimation during the trial, of anything upon which such remarks could be based.

The defendant's counsel, at the close of the plaintiff's argument, asked the judge to instruct the jury that there was no evidence to justify the use of the above language, and its use was uncalled for and without right, and that they should give it no consideration and no weight, as against the defendant. The judge did not give such instructions, but said to the jury concerning the use of the language:

"Of course you judge these cases, and I use the word *judge* advisedly, by what you hear in the court-room. I should feel very sorry if I thought for one moment that any other influence was used. A party comes into court and asks to have the rules of law applied, and it would be a matter of regret if any other rules should be applied, or if in any way you should be influenced. I speak of this because I was somewhat surprised at the suggestion that has been made. I sincerely hope, and I believe that, as far as you are concerned, it is a mistaken view. I believe this because I know how careful and scrupulous you have been during this sitting that the cases should be judged by you on the law and the evidence. Therefore I feel confident that there is no occasion for any suitor here to have any fear that jurors can be influenced by anything but that which is legitimately before them. Perhaps there is no occasion for me to say what I have said, and certainly there is no occasion for me to say anything more about it. You have shown by your treatment and careful examination of cases that you take them under the rules of law which both parties invoke when they come into the court-room. Both parties seek the benefit and the protection of those rules, and both have received thus far in this sitting that benefit and protection, and I have every confidence to believe they will continue to do so. You will take the case, and decide it according to those rules."

The defendant did not object or except to the instructions given. The jury returned a verdict for the plaintiff; and the defendant alleged exceptions to the refusal to give the above request to the jury.

E. H. Lathrop, for the defendant.

W. H. Brooks & W. Hamilton, (*A. T. Guyott* with them,) for the plaintiff.

MORTON, J. The remarks objected to were uttered in the closing argument of the counsel for the plaintiff. The exceptions state that there were no suggestions or intimations during the trial of anything on which they could be based. If anything material, which was likely to affect the proper course of the trial, and which appeared to justify what he said, had come to the knowledge of the counsel for the plaintiff, it was his duty to bring it to the attention of the court. If he merely suspected

or imagined that there might be something of that sort, then the intimations and suggestions and the declamatory style that were used, though probably due to the zeal of counsel in a closing argument, were unwarranted, and were not legitimate argument. While the court might properly enough have gone farther than it did, the instructions which it gave covered and included those which were requested. It told the jury, in substance, that they were to decide the case upon the law and the evidence and nothing else, and it is to be presumed that they did so.

Exceptions overruled.

J. S. NOBLE & another vs. BENJAMIN F. FAGNANT.

Hampden. September 26, 1894. — October 19, 1894.

Present: ALLEN, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Goods sold and delivered — Evidence — Tender — Breach of Warranty — Burden of Proof — Recoupment of Damages — Exceptions — Express Warranty — Implied Warranty.

In an action for goods sold and delivered, the defence to which is a breach of warranty of the quality of the goods, statements of a third person, who is not shown to have any connection with the plaintiff, in regard to the proper mode of using the goods, are rightly excluded.

If a part of a circular relating to an article of merchandise is put in evidence by the defendant, in an action for the price of the article, he has no ground of exception to the admission of the whole of the circular on the offer of the plaintiff.

A tender by A. to B. of a sum of money, before suit brought, is an acknowledgment by A. of the cause of action, and he cannot afterwards avail himself of the defence, in an action by B. for goods sold, that B. in making the sale was only acting as agent of C.

If, in an action for goods sold, the defendant relies on a breach of warranty of the quality of the goods, the burden of proof is on him to establish the warranty and the breach of it.

If a breach of warranty of the quality of goods sold is established, the defendant is entitled, in an action for the price of the goods, to have deducted from the contract price the difference in value between what he bought and what he received; and, if the goods were bought for a particular purpose, and were warranted fit for that purpose, and the defendant, relying upon the warranty, applies them to that purpose and suffers damage by reason of their unfitness, he is entitled to recoup the damages so sustained.

No exception lies to the refusal to give instructions in the terms requested, if they are given in substance.

If, in an action for goods sold, the plaintiff's evidence shows a refusal to warrant the quality of the goods, and the defendant relies upon an express warranty and a breach of it, he is not entitled to have the judge, who has instructed the jury fully upon the question of an express warranty, point out, at the close of the charge, the difference between an express warranty and an implied warranty.

CONTRACT, upon an account annexed, by J. S. Noble and G. H. Carter, copartners as Noble and Carter, for goods, consisting of cement and lime, sold and delivered. The answer set up the following defences: 1. A general denial. 2. That the plaintiffs acted as agents only in the sale of the cement, and such agency was disclosed prior to the sale. 3. An express warranty of the quality of the goods, and a breach of the warranty. 4. That the defendant had suffered damage by reason of the breach of warranty, and claimed to recoup for such damage. 5. A tender of two hundred dollars before suit brought, which the plaintiffs refused to accept, and which the defendant paid into court. Trial in the Superior Court, before *Maynard, J.*, who allowed a bill of exceptions, in substance as follows.

The plaintiffs introduced evidence tending to show that they were merchants, in Springfield, dealing in grain and masons' supplies, and had for sale a cement known as King's Windsor cement, which was manufactured in New York by J. B. King and Company, of whom they purchased through a travelling salesman by the name of Bronson; that Bronson left with them samples prepared by and showing what J. B. King and Company claimed would be the appearance and quality of the cement when mixed according to direction and properly placed upon a wall, and also a circular purporting to be issued by J. B. King and Company, setting forth their claim in regard to the cement, with directions for mixing, but that the plaintiffs' names nowhere appeared either on the samples or the circulars; that they bought and paid for this cement in the usual way; that they were not agents for J. B. King and Company, and did not sell the cement on commission, and never represented otherwise to the defendant; that they never employed agents to go out and represent them; and that Bronson was not their agent or in their employ, and had no connection with them, except that they bought the cement through him. The plaintiff Noble testified that the defendant came to their office to inquire in

regard to the cement in the fall of 1890, and was told the price, \$2.75 per barrel, and that "I showed him a sample as given to me by the manufacturers," meaning a sample of the finished plastering, "and finally agreed to let him have the cement at \$2.65 per barrel, as it was the first lot we had had for sale"; that "we could not guarantee anything in regard to it, and I sold it to him with the understanding that, if properly mixed according to directions, I presumed it would make as good a wall as represented." The plaintiffs also testified that the sample shown to the defendant was one given them by J. B. King and Company, and they so stated to the defendant; that they informed the defendant they could not guarantee the cement, because all that they knew about it was what was represented to them; that they had circulars in the office, but only gave them to people inquiring about the cement, and told them that that was the way they, the plaintiffs, received the cement; and that an agreement was concluded with the defendant as to the cement and lime, which was all furnished under one contract, but at different dates.

The defendant testified as follows: "The first I have known of King's Windsor cement was when the building was getting part way, I guess beginning the first story above the basement. A man came to me giving his name as Bronson, representing himself as the agent of the company, and giving me a sample and a circular [producing circular]. I don't say this is the one, but one just like it. This was got from Noble and Carter. I had never had anything to do with Noble and Carter but what I said in the office. When I went to Noble and Carter I was sent there, and I told them what Bronson had told me. 'Well,' he [Noble] says, 'anything that Mr. Bronson will tell you the company will back up.' I asked him what he thought. He said he didn't know anything about it. He told me what it was, what difference there was between that and common mortar; he said it would not peel off, nor crack, nor rub. He says, 'We don't know anything about it, because we only sell it on commission.' Besides that, I was telling Mr. Noble I had been approached by the agent of the adamant. I told him that if the King's Windsor cement was as good as represented I would give him an order for it, because it was only half the price;

it would cost me ten cents a pound, while the other was going to cost me twenty. He says, 'I can't tell you anything, because we are only agents, only selling it on commission. Besides, it won't do for me to say anything to induce you to take one or the other, because we sell both.' I entered a complaint only when we got the second lot. After we had put it on four tenements, we got out of it, and had to wait for some more. The first lot we used just as the directions said, two to one. When we got the second lot the orders were, whenever there should be anything at fault to let them know. It was Bronson that gave me the order. I went there to Noble and Carter, telling them that the second lot would not work at all; that they had used it with more sand, and only in that way could they work it at all. 'All right,' Noble said, 'I will let the company know, and the agent will come.' When the agent came, they told him what it was doing, and how it was working. Noble and Carter never referred me to Bronson. They said one time when I was there, that whatever Bronson should represent the company would make right; and every time I went to inquire or find fault, they said they would write to the company, and never anybody but Bronson came to me."

The defendant further testified as follows:

"Q. Do you know whether the directions were printed upon the barrels? A. They were, sir.

"Q. And were those directions followed in the mixing and putting on of the cement? A. They were followed as long as we could follow them, but when we were directed differently, because of the impossibility of fulfilling them, it was through the agent that was sent to us. When I went to Noble and Carter, then we followed what directions were given us. But no directions came from Noble. Bronson gave us all the directions we had.

"Q. Whether the walls are hard or soft? A. They are a great deal softer than the sample, and I show you the sample now.

"Q. What is the condition of the outside coat, that is, the hard finish coat, as to whether it will rub off or not? A. It rubs off so you can't go by the walls without getting your clothes all dusty.

"Q. What is its condition as to cracking? A. It is all cracked.

"Q. Whether in one room or more? A. All the rooms more or less. It is cracked so badly that after being painted you can see the cracks. All over some places it is peeled off. You can't cover them. I have had skilled workmen there, and they can't cover them with paint."

To meet this testimony of the defendant, evidence was introduced by the plaintiffs tending to show that all defects and troubles with the cement were caused by improper manipulation, excessive use of sand, and improper exposure, on the part of the defendant.

The defendant also testified that he informed the plaintiffs that the material was to be used for the purpose of plastering and hard finishing the walls and ceilings of rooms in a block the defendant was then erecting.

The defendant introduced evidence that the sample shown to him was hard and strong, and the sample of hard finish was smooth and hard; and there was evidence of an expert, that he had analyzed the same, and that the sample delivered to the defendant contained twenty per cent more hardening material than the goods which were delivered to the defendant.

Evidence was offered tending to show that the walls of the defendant's premises were badly cracked in all directions, and that the last coat, which was called hard finish, was so soft that it rubbed off like chalk; and the defendant's witnesses testified that the soft condition of the hard finish was caused by defective material and absence of hardening material. This evidence was contradicted.

One McGarrett, a witness for the plaintiffs, testified in his deposition, in response to the question, "Did Bronson come to Noble and Carter's place of business frequently?" that he did, and, in response to the question, "What business had he there?" that "It was a stopping place to confer relative to the use and sale of King's Windsor cement," and further as follows: "Q. Did Noble and Carter, or you, acting for them, correspond with J. B. King and Company in reference to the cement sold to Dr. Fagnant? A. My impression is that we did." "Q. Did J. B. King and Company send some one to examine the cement

on the building in Springfield? A. There was a man came, Bronson by name, and I suppose J. B. King and Company sent him." He also testified that the plaintiffs did not sell King's Windsor cement on commission, and handled no goods on commission; that they purchased the cement of J. B. King and Company, through Bronson; that Bronson had no connection whatever with the plaintiffs; that the plaintiffs did not refer the defendant to Bronson when complaining about the cement; that he did not know what connection Bronson had with J. B. King and Company; and that Bronson came to the plaintiffs frequently to sell them cement, and his business was to sell the cement and to induce parties to use it, but he never sold cement for the plaintiffs, nor endeavored to induce people to use this cement on the plaintiffs' account, nor acted for them in any way with reference to the use or sale of their cement, and was never employed by them for any purpose whatsoever.

The defendant offered the statements of Bronson to show that he instructed them to use more sand; and that a portion of the cement was mixed according to the directions given by Bronson. The judge excluded the evidence; and the defendant excepted.

The defendant put in evidence a portion of the circular referred to in the testimony of the plaintiff Noble and the defendant, whereupon the plaintiffs offered in evidence the whole circular, which was admitted, against the objection and exception of the defendant.

The defendant asked the judge to instruct the jury as follows:

"1. If the jury believe that the plaintiffs were acting as agents selling on commission, then the defendant is entitled to a verdict.

"2. If the jury believe that the plaintiffs were not acting as agents, but were acting as principals, and Bronson made the representations which are testified to by the defendant with the knowledge, consent, or authority of the plaintiffs, and the defendant, relying upon such representations, and being induced thereby to purchase the material, has been damaged thereby, then the defendant is entitled to a reduction of such amount as the jury believe he has been damaged.

"3. If the jury believe that the representations made by or with the knowledge or consent of the plaintiffs and relied upon by the defendant, inducing him to purchase the cement, were such as to lead a person to believe that, after the material was applied, it would not rub off, and the jury believe the same was applied as directed, and the same did and does rub off, and thereby renders the walls and ceilings defective, then the defendant is entitled to an allowance against the plaintiffs for such an amount as it will be necessary to expend to put the walls in a reasonably proper and suitable condition, together with the amount he has already expended for repairing the same more than would have been required if hair and lime mortar had been used, and also to such rent as he may have lost by reason of the defective condition of the walls.

"4. If the jury believe that the plaintiffs represented and held themselves out to be agents only, then the plaintiffs are bound by such representations, and are estopped from now claiming that they were and are principals, and the defendant will be entitled to a verdict.

"5. If the jury believe that the plaintiffs, either by themselves or their agents, represented the material to be of as good quality as the sample, and the defendant, relying upon such representation, purchased such material, and the material was of less value and quality than that shown in the sample, then the defendant is entitled to an offset against the plaintiffs for the difference in value.

"6. If the jury believe that the plaintiffs warranted the material, or authorized the same to be warranted, or adopted the warranty made by any other person or persons, then the burden is upon the plaintiffs to prove that the material furnished was in all respects equal to the warranty.

"7. If the jury believe that the plaintiffs warranted the material to be of a certain quality, or authorized the same to be warranted, or adopted a warranty of another person, or, knowing the same to have been warranted, allowed the defendant to purchase the same relying upon the warranty, and it is contended that the imperfect condition of the walls was caused by improper manipulation of the material, then the burden is upon the plaintiffs to prove that the material was not properly manipulated.

.

"8. If the jury find that the plaintiffs or their agent had instructions as to the method of mixing and laying the material, and such instructions were followed, and the walls are in an imperfect condition, then the defendant is entitled to recover of the plaintiffs such sum as it will cost to put the walls in proper condition.

"9. The tender is not to be taken as an acknowledgment that the defendant owes the plaintiffs the amount of money tendered, nor as an admission by the defendant that he owes the plaintiffs any amount, but the jury are at liberty to find what amount, if any, is justly due from either party to the other.

"10. If the plaintiffs put out or distributed written or printed circulars, or allowed the same to be delivered, which circulars represented King's Windsor cement to be a first-class material and a merchantable article, and the defendant, relying upon such representations, purchased said material, and the material was not as represented in the circulars, and the defendant has thereby been injured, then the defendant is entitled to an allowance for such sum as it will cost to make it equal to sample.

"11. If the plaintiffs referred the defendant to Bronson as a party qualified to give the requisite information as to the quality of the material, such reference would operate as an adoption of Bronson as their agent, and the plaintiffs would be bound by such representations as Bronson might make in reference to it, and if the jury find that the material was not as represented by Bronson, then the defendant is entitled to an allowance of such an amount as it will cost to put the walls in proper shape.

"12. If the plaintiffs made sale of the goods in question, knowing the use to which they were to be put, such sale carried with it an implied warranty that the goods were suitable for the work required, and if the jury find that the goods were not suitable for the work required, then the defendant is entitled to an allowance for such sum as will be required to put the walls in proper condition.

"13. If the plaintiffs represented themselves to be agents in the sale of the King's Windsor cement, and thereby sought to avoid responsibility as to the quality of the goods, then the plaintiffs are estopped from maintaining this action, and must be

considered, for the purposes of this cause, agents only, and not entitled to maintain this action.

" 14. If the plaintiffs employed or authorized Bronson to sell or negotiate for the sale of cement on their account, or if the plaintiffs had acknowledged that Bronson was so acting, and Bronson induced the defendant to buy, and made fraudulent or false representations as to the cement, or warranted that it was superior to lime and hair mortar and would not rub, check, or crack, upon which representations the defendant relied and by which he was induced to purchase, then the plaintiffs would be responsible for the warranties or misrepresentations by Bronson, notwithstanding the fact that the plaintiffs did not know that Bronson made such representations or gave such warranty prior to his doing so, and if the plaintiffs were informed prior to the sale that the defendant had been induced to purchase by the warranty and representations made by Bronson and had been sent to the plaintiffs to make the purchase, the plaintiffs cannot avoid their liability by a statement that they knew nothing personally about the plaster."

The judge refused to give the rulings requested, but instructed the jury, among other things, as follows :

" When a man pleads a tender and brings it into court, he acknowledges by that act that so much as he tenders and brings into court is due, and he acknowledges the contract upon which the same is tendered. So that by making that tender and bringing that money into court the defendant acknowledges that the contract existed, and that there was the sum of two hundred dollars due on it, and so he is estopped now to deny that there was a contract with these plaintiffs, and he cannot set up as a defence that they were not principals and owners of the goods, but were agents of somebody else, so that the question that was set up as an answer, that these were not their goods and they had no right to them, but they were agents of the New York firm, is not open to the defendant.

" Now, was there a warranty of these goods by the plaintiffs? In the sale of personal property the affirmation by the seller of any essential quality of the goods would be a warranty. But there is something besides that in order to make a seller liable for breach of warranty. There must not only be an affirmation

of some essential quality by the seller made at the time of the sale, but that affirmation must be a material inducement to the purchaser upon which he relied, in order, in case the goods are not up to the affirmation, to make it a breach of the warranty for which the seller would be liable. That is, in order to entitle a defendant to set up a breach of warranty, there must not only be the warranty, but he must satisfy you that he relied upon that as an inducement, not necessarily the whole inducement, but relied upon it as a material inducement for the purchase of the goods. That is, if a party acts on his own judgment in buying goods, or acts upon the representation of somebody outside of the seller for whom the seller is not responsible, and relying upon his own judgment and the representations of somebody outside of the seller, or either one of them, not relying in any material sense on what the seller says, then the seller is not responsible, because the man is not induced by anything the seller says to make the purchase. The man must have suffered by the wrongful act of the seller.

“Now a party selling goods is responsible for the acts of his agent, for the representations of his agent, the same as though they were his own, that is, representations made within the scope and the line of authority and duty of the agent. That is, if an agent, while prosecuting his master's business, makes a representation in regard to that business, if employed in selling goods in regard to the goods, it would be the same as though the master made them. But the representations of any person outside, who is not the agent, are not the representations of the master, and the master would not be liable for them. Now in this case there has been some evidence of what a man named Bronson said in regard to those goods. I shall have to instruct you that in this case, upon the defendant's testimony and upon the plaintiffs' testimony, upon all the testimony, there is no evidence from which you can find that Bronson was the agent of these plaintiffs. It was agreed, and there is no dispute, that he was the agent of the New York firm. But anything which was said about it, either by Carter, who was one of the plaintiffs, or by Noble, or by the clerk whose deposition you have heard, — I think those were the only other parties, — any representations made by them the plaintiffs would be responsible for.

"Now, was there a warranty? You have heard from those different parties what was said there, and if there was any warranty of these goods it was made at that time, as I suggested to you in the early part of my instructions. All the other testimony in regard to it is simply evidence for your consideration as bearing upon the question of what was said and done there. Of course, the actions of parties are always to be taken into account, and their words have to be judged by their actions oftentimes, so that what was said and done afterwards is evidence bearing upon what was said and done at the time when the price was fixed for the goods. Well, upon the evidence it is for you to determine whether these goods were warranted by these plaintiffs. If they were not warranted by these plaintiffs, then there is no defence to this action or any part of it. It is for you to determine whether there was a warranty, and if there was, was there a breach of it? Was it or was it not what it was represented to be?

"If you find there was a warranty and a breach, if the goods were not equal to the warranty, the defendant would have a right to have deducted from the contract price the difference in value between what he bought and what he got. The defendant has set up in his answer also, not only that the articles were not as good as what he bought, as what was warranted, but that he was induced to use them, and used them in such a manner that he has been damaged and injured thereby. Now, if the defendant bought the goods for a certain purpose which the plaintiffs knew, and they were warranted to be of a certain kind, and they were not of that certain kind, and the defendant believing or having reasonable cause to believe that they were of the kind warranted, and were proper and suitable for the work which he put them into, and relying upon that he did put them into a certain kind of work, and if he suffered loss on account of using them in that way, then whatever loss was the natural result of his using them for that purpose he would be entitled to recoup in the way of damages."

The defendant excepted to the refusal to rule as requested, and to so much of the charge as related to the effect of a tender, and to the question of Bronson's agency.

At the close of the charge, the defendant asked the judge to

point out the difference between a specific and implied warranty. To this the judge replied, "I think I have covered the ground fully," and declined to give further instructions; and the defendant excepted.

The jury returned a verdict for the plaintiffs; and the defendant alleged exceptions.

A. M. Copeland & A. Webster, for the defendant.

W. B. Stone, for the plaintiffs.

KNOWLTON, J. 1. The statements of Bronson in regard to the proper mode of using the cement were rightly excluded. The plaintiff Noble and his clerk testified that Bronson had no connection with the plaintiffs, and the defendant also testified that the plaintiffs never referred him to Bronson, and that in his interviews with them they always represented Bronson to be the agent and representative of the manufacturers, J. B. King and Company, and not of themselves.

2. No error appears in the admission of the circular as a whole on the plaintiffs' offer after a part of it had been put in by the defendant. The bill of exceptions does not show what part was introduced by the defendant, and what was subsequently put in by the plaintiffs. As a general rule, when a part of a document is introduced by one party, the other is entitled to put in the remainder of it.

3. The judge rightly ruled that the defendant by his tender acknowledged the cause of action, and that he could not afterward avail himself of the defence that in making the sales the plaintiffs were only acting as agents of J. B. King and Company. *Hubbard v. Knous*, 7 Cush. 556. *Bacon v. Charlton*, 7 Cush. 581. *Hosmer v. Warner*, 7 Gray, 186. *Bouvé v. Cottle*, 143 Mass. 810.

4. The instructions in regard to the warranty were correct. If the defendant relied on a breach of warranty of the quality of the article sold, the burden of proof was on him to establish the warranty and the breach of it. *Dorr v. Fisher*, 1 Cush. 271. *Lothrop v. Otis*, 7 Allen, 435. The rule of damages to be allowed for a breach of a warranty, both in ordinary cases and when the goods are sold for a particular use, was rightly given. Without considering in detail the instructions requested by the defendant, we are of opinion that, so far as the propositions of

law contained in them were correct and pertained to the case, they were covered by the charge, and that there was no error in the refusal to give them as presented.

Upon the testimony of the defendant, as well as upon that of the plaintiffs, there was no occasion to point out the difference between an express warranty and an implied warranty, as the defendant requested the judge to do at the close of the charge.

Exceptions overruled.

EDWARD GOODES, administrator, *vs.* BOSTON AND ALBANY
RAILROAD COMPANY.

Hampden. September 26, 1894. — October 19, 1894.

Present: ALLEN, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

*Loss of Life — Railroad — Master and Servant — Assumption of Risk — Action
— Evidence — Due Care.*

One entering the employ of another assumes the obvious risks arising from the nature of the employment, from the manner in which the business is carried on, and from the condition of the ways, works, and machinery, if he is of sufficient capacity to understand and appreciate them.

At the trial of an action against a railroad corporation for causing the death of the plaintiff's intestate, who was in its employ as a brakeman, it appeared that, in the night time, while engaged in the performance of his duties, he struck against a switch-stand, which stood close to the track, and was knocked from the car, receiving injuries which resulted in his death; that at the time of the accident he had been in the defendant's employ nearly three months; that before entering the defendant's employ he had worked several months on another railroad as a brakeman; that he was strong, active, healthy, of good eyesight and hearing, knew his business, and was competent and intelligent; that in the course of his employment he had been frequently by day and by night over and by the switch where he was knocked off; that the switch was in the same place and was the same in all respects as when he entered the defendant's employ; and that there had been no change in the adjacent tracks. *Held*, that he had assumed the risk of injury from the proximity of the switch to the track; and that the action could not be maintained.

If a person while in the employ of another is injured by an accident which happens in the ordinary course of his employment, and while he is engaged in the performance of duties to which he is accustomed and under circumstances which are not unusual, in an action for the injury the case does not call for instructions on the question whether the emergency was such that he could fairly be said to have voluntarily assumed the risk of the injury.

In an action against a railroad corporation for causing the death of the plaintiff's intestate, who was in its employ as a brakeman on a freight train, and who

received the injuries which resulted in his death, while engaged in the night time in uncoupling cars, by striking against a switch-stand, which stood close to the track, and being knocked from the car, the plaintiff offered evidence as to the customary manner of uncoupling cars, as to the practice of conductors to do the uncoupling, as to whether the train ordinarily came up to the switch-stand, and as to the distance at which the switch-stand could be seen. *Held*, that the evidence was admissible upon the question whether the plaintiff's intestate was in the exercise of due care.

TORT, under Pub. Sts. c. 112, § 212, as amended by St. 1883, c. 243, by the administrator of the estate of John Hopkins, for causing his death. At the trial in the Superior Court, before *Dewey, J.*, it appeared that the plaintiff's intestate was in the employ of the defendant corporation as a brakeman; that on August 17, 1892, in the night time, while engaged in uncoupling cars on a freight train, he struck against a switch-stand, which stood close to the track, and was knocked from the car; and that he received injuries which resulted in his death.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The facts material to the points decided appear in the opinion.

W. H. Brooks, (*W. Hamilton* with him,) for the defendant.

J. B. Carroll, for the plaintiff.

MORTON, J. One entering the employment of another assumes the obvious risks arising from the nature of the employment, from the manner in which the business is carried on, and from the condition of the ways, works, and machinery, if he is of sufficient capacity to understand and appreciate them. It is not necessary to inquire whether this doctrine rests upon contract or upon the inherent reasonableness and justice of the rule itself, as applied to the relations of master and servant. It has been long and well settled at common law, and it is not contended by the plaintiff that it does not apply to cases arising under the employers' liability act, so called. We think that this case comes within it.

The plaintiff's intestate was in the service of the defendant as a brakeman. At the time of the accident which resulted in his death he had been in the defendant's employ three months less a few days. Before entering the employment of the defendant he had worked several months on another railroad as a brakeman. He was strong, active, healthy, of good eyesight and hearing,

knew his business, and was competent and intelligent. It appeared from uncontradicted testimony that in the course of his employment he had been frequently by day and by night over and by the switch where he was knocked off. It further appeared, also by uncontradicted testimony, that the switch was in the same place, and was the same in all respects as when he entered the defendant's employment, and that there had been no change in the adjacent tracks. The condition of things was perfectly obvious, and there was nothing in the nature of a trap or a hidden defect, and at the time of the injury he was engaged in a service growing out of the nature of his employment, with which he was familiar, and which he had been accustomed to. Under such circumstances he must be held to have assumed the risk of injury from the proximity of the switch to the track, and the rulings asked for by the defendant to that effect should have been given. *Lovejoy v. Boston & Lowell Railroad*, 125 Mass. 79. *Coombs v. Fitchburg Railroad*, 156 Mass. 200. *O'Maley v. South Boston Gas Light Co.* 158 Mass. 135. *Fisk v. Fitchburg Railroad*, 158 Mass. 238. *Kleinst v. Kunhardt*, 160 Mass. 230. *Goldthwait v. Haverhill & Groveland Street Railway*, 160 Mass. 554. *Thain v. Old Colony Railroad*, 161 Mass. 353. *Feely v. Pearson Cordage Co.* 161 Mass. 426. *Randall v. Baltimore & Ohio Railroad*, 109 U. S. 478. *Tuttle v. Detroit, Grand Haven, & Milwaukee Railway*, 122 U. S. 189.

As the case stands, we find nothing in the exceptions calling for instructions on the question whether the emergency was such that the plaintiff's intestate fairly could be said to have voluntarily assumed the risk. As already observed, the accident happened in the ordinary course of his employment, and while he was engaged in the performance of duties to which he was accustomed, and under circumstances which were not unusual.

The testimony that was objected to was rightly admitted.* It all bore upon the question of whether or not the plaintiff's intestate was in the exercise of due care.

Exceptions sustained.

* This evidence was upon the following points: 1. As to the customary manner of uncoupling cars. 2. As to the practice of conductors to do the uncoupling. 3. As to whether the train ordinarily came up to the switch-stand. 4. As to the distance at which the switch-stand could be seen.

CATHERINE O'GRADY vs. TIMOTHY O'GRADY.

Hampden. September 26, 1894. — October 19, 1894.

Present: ALLEN, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Agreement upon Conveyance of Land — Deduction of Mortgage Debt — Instructions to Jury — Evidence — Statute of Frauds.

The declaration alleged that the plaintiff conveyed to the defendant certain real estate, subject to mortgage, and that in consideration thereof the defendant agreed to pay off the mortgage and sell the real estate for the plaintiff's benefit, and pay over to him the proceeds less the amount paid on the mortgage, and, in case he could not sell the real estate, to pay the plaintiff the market value thereof; that the defendant did pay off the mortgage, but, though requested by the plaintiff, refused to sell the real estate for the plaintiff's benefit or to pay him therefor. The jury were instructed to return a verdict for the defendant if they found that any debt except the mortgage was to be deducted from the value of the premises, and they returned a verdict for the plaintiff. *Held*, that it was for the jury to say upon the evidence what the contract was, and that the statute of frauds was not a defence.

CONTRACT, to recover the value of certain real estate conveyed by the plaintiff to the defendant, less the amount of a mortgage for \$400 existing thereon at the time of the conveyance. The declaration contained two counts, the first of which alleged that the plaintiff conveyed to the defendant the real estate, subject to the mortgage, and that in consideration thereof the defendant agreed to pay off the mortgage and sell the real estate for the benefit of the plaintiff, and pay over to her the proceeds less the amount paid by the defendant on the mortgage, and, in case the defendant could not sell the real estate, to pay the plaintiff the market value thereof; that, conformably to the agreement, the defendant did pay off the mortgage, but, though requested by the plaintiff, he refused to sell the real estate for her benefit or to pay her therefor.

The second count was an account annexed for the sum of \$2,800 less \$400, the amount paid on the mortgage.

Answer: 1. A general denial. 2. The statute of frauds. 3. Want of consideration. Trial in the Superior Court, before *Fessenden, J.*, who allowed a bill of exceptions in substance as follows.

The plaintiff testified that her husband died on the morning

of December 6, 1884; that the evening before she and her mother and sister and the defendant were present; that the plaintiff's husband told the defendant that there was a mortgage on the property, and said, referring to the plaintiff, "She has n't got any money, and I want you to turn everything into money for her,—everything, wagons and everything there is, and sell the property or buy it from her, pay off the mortgage, and pay over the balance in money, for she will need it all for the children"; that the defendant said, "All right"; that after the funeral the plaintiff's father took her to his home in Warren, and in the following July the defendant and his sister one Sunday drove over to the house where the plaintiff was, and she spoke to the defendant about the property, and the fact that the interest was coming due; that he said, "Any day you say you will meet me in Palmer I will come, and we will have the deed made over"; that he appointed a day, when they met, and his lawyer did the business and was paid by the defendant; that it was in pursuance of the request of her deceased husband and the defendant's agreement thereto that she made the conveyance to the defendant, and, according to her understanding, it was in pursuance of this agreement that he received it; that this talk at her father's house was the first she had had with the defendant after his talk in the presence of her husband about this property; that nothing was paid her at the lawyer's office, and nothing was said about any compensation beyond what was said at her husband's bedside; that she had owned the property about two years when she conveyed it to the defendant; that a short time before the suit was brought the defendant came to her house, and she told him she was sick and under the doctor's care, and she said, "I don't know how I shall ever take care of those children," and she thought that he ought to do something, but he made no reply; and that she asked him if he was ready to pay her anything on the property, and he made no reply.

On cross-examination the plaintiff testified that there was an understanding that the defendant was to pay the funeral expenses, as well as the mortgage, in consideration of the deed, and that he paid them, although at the close of the examination she testified, "I put the funeral expenses in; I would pay the funeral expenses, I am willing to pay them."

Bridget Haley, the mother of the plaintiff, testified that her son in law said to the defendant, "You sell this property if you can, and if you can't, you buy it yourself and pay the mortgage and give her the balance, for she will need it to take care of the children. Timothy said, 'All right.'" And also, "I never heard a word said about the expenses of his burial, — never."

The defendant testified that he had no talk with the plaintiff's husband with reference to any sale of the place, but that after the latter's death the plaintiff proposed to give him the deed if he would pay all her husband's debts, and that soon after the delivery of the deed he did pay off the mortgage, which, with interest, amounted to about four hundred and twenty five dollars; the funeral expenses, amounting to from a hundred to a hundred and twenty-five dollars; and a debt due the plaintiff's father in law for money borrowed by her husband, amounting to four hundred and fifty dollars; none of which were the debts of the plaintiff, and the last one was a debt the existence of which the plaintiff denied.

The plaintiff testified that the doctor's bill had never been paid by the defendant, and that she had heard the defendant say that the value of the property at the time she conveyed it to him was \$2,000. Other evidence was introduced on both sides as to the value of the property, the witnesses varying materially in their estimates.

At the close of the evidence, the plaintiff requested the judge to rule as follows:

"1. The plaintiff is not entitled to recover, because the contract upon which this action is brought was not in writing, as required by Pub. Sts. c. 78, § 1. 2. The plaintiff is not entitled to recover, because there is a variance between the evidence and the allegations in the declaration. 3. Upon all the evidence, the plaintiff is not entitled to recover."

The judge declined so to rule, but instructed the jury, among other things, without objection from the defendant, that, if they found that by the terms of the agreement between the plaintiff and the defendant the plaintiff was entitled to recover, it must be for the market value of the real estate less the amount of the mortgage, and that they should not deduct from that sum anything on account of the funeral expenses claimed to have been

paid by the defendant, or the money paid on account of the loan claimed to have been made to the plaintiff's husband; that, if they found upon the evidence that any debt except the mortgage debt was to be deducted from the value of said premises, they must find for the defendant, as that was not the contract upon which the plaintiff relied. Proper instructions as to what would justify the jury in finding that a contract was made, and upon other branches of the case, were given, and were not excepted to.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

C. L. Gardner, for the defendant.

W. B. Stone, for the plaintiff.

MORTON, J. The jury were instructed to return a verdict for the defendant if they found that any debt except the mortgage debt was to be deducted from the value of the premises. They returned a verdict for the plaintiff, and therefore must have found that the mortgage debt was the only one to be deducted. On her direct examination the plaintiff's testimony tended to show that the agreement was as stated in the declaration. On her cross-examination she said some things which seemed to be inconsistent with her direct testimony. The jury may have found, however, that the inconsistencies were only apparent, and not real, and were due to mistake and misunderstanding on her part. The testimony of the witness Haley also tended to show that the contract was as set out in the declaration. It was for the jury to say, upon the whole case, what the contract was, and we think that there was evidence that justified their verdict.

We do not understand the defendant seriously to contend that the statute of frauds is a defence. If the contract set out in the declaration was within the statute, it would not help him. The plaintiff has conveyed the premises according to agreement, and the defendant, after getting possession of the property, has refused to perform his part of the contract. It is well settled in this State, that under such circumstances the plaintiff may recover the value of the property conveyed, even though the agreement is within the statute. *Dix v. Marcy*, 116 Mass. 416, and cases cited. *Root v. Burt*, 118 Mass. 521. *Parker v. Tainter*, 123 Mass. 185.

Exceptions overruled.

LILIAN H. ANDREWS, receiver, vs. PHILIP W. MOEN,
administrator.

Worcester. October 1, 1894. — October 19, 1894.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Foreign Corporation — Debt at Common Law — Equity — Fraud — Jurisdiction.

A claim of a receiver of a corporation established under the laws of another State, and having its place of business therein, for a part of a subscription for its capital stock, is a simple claim for a debt, and is made nothing more by a fraudulent but vain pretence of paying it. Therefore a bill in equity cannot be brought to compel its payment, and the equitable remedy, if any, must be pursued in the State in which the corporation was organized.

BILL IN EQUITY, filed in the Superior Court by Lilian H. Andrews, receiver of the Cary and Moen Company, a corporation established under the laws of the State of New York, and having its place of business therein, to compel the defendant, administrator of the estate of Philip L. Moen, to pay over a balance of money and interest.

The bill alleged that the corporation was organized in the year 1888 for the purpose of succeeding a partnership consisting of one A. Cary and one E. A. Moen, and bearing the name of Cary and Moen, and in fact received assignments and conveyances of the property of the partnership, and succeeded to its business; that the capital stock was one hundred and twenty-five thousand dollars divided into twelve hundred and fifty shares at the par value of one hundred dollars each; that Philip L. Moen, late of Worcester, the defendant's intestate, subscribed for and agreed to take and pay par value for four hundred and forty-four shares and was bound to pay to the corporation therefor the sum of forty-four thousand and four hundred dollars; that he did actually pay to the corporation in cash, on June 18, 1888, the sum of four thousand five hundred and ninety-five dollars and sixty-four cents, and on June 20, 1888, the sum of three thousand seven hundred and forty-nine dollars and ninety-nine cents, making a total of eight thousand three hundred and forty-five dollars and sixty-three cents, and the balance of said forty-four thousand and four hundred dollars, to wit, thirty-six thousand and fifty-four dollars

and thirty-seven cents, was never paid in any legal and effectual manner, and the said Philip L. Moen remained liable in law and in equity, and his estate remains liable in law and in equity, to pay to said corporation, or the plaintiff as receiver, the balance, with interest thereon from June, 1888; that, with intent to defraud the future creditors of the corporation, and the corporation itself, Philip L. Moen, E. A. Moen, and Cary combined and conspired together, being the owners of a large majority of the stock of the corporation, and E. A. Moen and Cary being the officers and managers thereof, to cause the corporation to receive, in lieu of cash or other valuable property from Philip L. Moen in payment for the balance due for the said four hundred and forty-four shares of the said corporation, certain notes and claims which Philip L. Moen then held against the partnership of Cary and Moen, and in pursuance and execution of the conspiracy the claims were turned over to and received by the corporation in lieu of cash or other valuable property in alleged payment for the balance of the stock; that the claims against the partnership of Cary and Moen were then worthless and known to be so by said Philip L. Moen and E. A. Moen and Cary, and the alleged payment did not constitute any valid payment for the capital stock, and the same was a fraud upon the corporation and its future creditors, and was in violation of the statutes of the State of New York; that in aid of the combination and conspiracy, and as a part thereof, Philip L. Moen, E. A. Moen, and Cary combined and conspired together to cause the corporation to receive from the partnership of Cary and Moen all the property of the partnership, which was turned over to and received by the corporation at a grossly exaggerated and fictitious value, and to cause the corporation to assume the liabilities of the partnership, among which were the claims held as aforesaid by Philip L. Moen; that a very large part of the property on which the capitalization of the corporation was based was the nominal balance between the assets of the partnership so as aforesaid grossly exaggerated in value and placed at a fictitious value, and the liabilities thereof; that in fact, at the time the corporation was organized and at the time of the combination and conspiracy, the partnership of Cary and Moen was insolvent, and was known to be so by Philip L. Moen and by E. A. Moen and Cary, and the

property and assets of the partnership were of no value whatever above its liabilities, as the parties well knew, and the scheme was knowingly and designedly entered into by the parties with a view to defraud the corporation and its future creditors, by giving it a fictitious credit, and by making it appear that all its capital stock had been paid in in cash or its equivalent; that the corporation thereafter went on and did business, and incurred large liabilities between the date of its organization and April, 1891, and credit was given it by its present creditors on the faith that its capital stock had all been paid in in cash, or its equivalent, and in ignorance of the combination and conspiracy by which a large part of the capital stock was issued to Philip L. Moen without any payment of value therefor; that the excess of the liabilities of the corporation above all its assets was about one hundred thousand dollars, and in the Supreme Court of the State of New York in and for the City and County of New York proceedings were pending, the said Andrews having been duly appointed receiver, wherein all creditors had an opportunity to prove their claims, and the design of which was to distribute by due process of law *pro rata* among the creditors all the assets of the corporation; that by reason of the said combination and conspiracy, and the transactions hereinbefore set forth done in furtherance and in execution thereof, by force of his subscription and of the law of the State of New York Philip L. Moen was bound to pay the whole amount of his subscription for the capital stock in money, and was therefore bound to pay the balance of thirty-six thousand and fifty-four dollars and thirty-seven cents to the corporation, due for the shares subscribed for by him as aforesaid; and that the same had never been paid and was still due from his estate. The prayer was that the defendant be decreed to pay said balance and interest.

The defendant demurred to the bill, assigning among other grounds of demurrer want of jurisdiction, want of equity, and a complete remedy at law. The demurrer was sustained by Aldrich, J., and the plaintiff appealed to this court.

F. P. Goulding, (F. L. Dean with him,) for the plaintiff.

W. S. B. Hopkins & C. M. Rice, (H. W. King with them,) for the defendant.

HOLMES, J. This bill is brought to compel the payment of part of a subscription for stock in the company of which the

plaintiff is receiver. It does not appear sufficiently that the receiver has a *locus standi* outside of New York; but if it be assumed that he has, the claim is a simple claim for a debt, and is made nothing more by the allegations that there has been a fraudulent but vain pretence of paying it, of a kind which does not need the aid of equity to set it aside. That is all that the other allegations of the bill amount to. It is averred that the defendant's intestate attempted to defraud future creditors of the corporation and the corporation by turning over worthless notes and claims in satisfaction of the balance remaining due for the stock, but that the attempt was so far vain that there was no valid satisfaction. In fact it is alleged in terms that the estate in the defendant's hands "remains liable in law and in equity to pay" the balance. This being so, there is no ground for taking jurisdiction in equity. The claim does not arise out of the alleged frauds; it simply has failed to be defeated by them, either at law or in equity. If in New York equity might take jurisdiction, we presume that it would be only as a means of winding up and adjusting the relations between the company, the creditors, and the stockholders under the local statutes; a matter which we are not asked to attempt and should not attempt. What remedies might be open in the courts of that State to protect the rights of creditors, we have no occasion to consider.

We may add, that, as we understand the bill, the claims turned over were valid claims against the partnership which the corporation succeeded, and they were worthless only in the sense that the partnership was insolvent, and that the whole transaction by which the corporation assumed its assets and liabilities was a fraud. But the bill does not attempt to undo that transaction, and it is hard to see how the plaintiff can repudiate the satisfaction accepted from the defendant's intestate without returning what the corporation received. However, as the bill goes on the footing of such a repudiation, there is no jurisdiction on the ground of an account to be taken of the sums, if any, properly to be allowed the defendant for the notes and claims transferred by his intestate.

Bill dismissed.

BENJAMIN P. PEAK & another vs. EDWARD E. FROST.

Worcester. October 1, 1894. — October 19, 1894.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

False Representations — Damages — Expense of Keeping Horse — Reasonable Time — Allegations of Declaration.

In an action to recover damages for the sale of a stallion by means of the false representations of the defendant of the value of the stallion as a breeding horse, the plaintiff can recover, in addition to the difference in value, the expense of keeping the stallion a reasonable time to test him.

In an action to recover damages for the sale of a stallion by means of the false representations of the defendant of the value of the stallion as a breeding horse, allegations in the declaration that the plaintiff did expend large sums in the care and maintenance of the stallion until he could test him as a breeder, and did so attempt to test him, and did thereby incur liabilities and expend large sums, are sufficient to include the expense of keeping the stallion.

TORT, to recover damages for the sale of a stallion by means of the alleged false representations of the defendant. At the trial in the Superior Court, before *Aldrich, J.*, the jury returned a verdict for the plaintiffs; and the defendant alleged exceptions, which sufficiently appear in the opinion.

W. S. B. Hopkins & F. B. Smith, for the defendant.

R. Hoar, for the plaintiffs.

MORTON, J. There was evidence tending to show that the stallion was bought by the plaintiffs as a breeding horse, and that they were induced to purchase him by certain false representations made to them by the defendant respecting his fitness for that purpose. The plaintiffs had a verdict, and the only question now is, whether, in addition to the difference in value, they can recover the expense of keeping the horse a reasonable time to test him. The presiding justice ruled that they could, and we think that the ruling was right.

The horse was bought by the plaintiffs for a specific purpose known to the defendant, and he is liable to the plaintiffs for all the damages resulting naturally and directly to them from its unfitness for that purpose, or for such as may reasonably be presumed to have been within the contemplation of the parties

when the contract was entered into as a probable result of the defendant's misrepresentations. *White v. Moseley*, 8 Pick. 356. *Bartlett v. Blanchard*, 13 Gray, 429. *Bradley v. Rea*, 14 Allen, 20. *Wellington v. Downer Kerosene Oil Co.* 104 Mass. 64. *Johnson v. Holyoke*, 105 Mass. 80. *Allen v. Truesdell*, 135 Mass. 75. *Whitehead & Atherton Machine Co. v. Ryder*, 139 Mass. 366, 370, 371. *Grindle v. Eastern Express Co.* 67 Maine, 817. *Thoms v. Dingley*, 70 Maine, 100. *Passinger v. Thorburn*, 34 N. Y. 634. *Beeman v. Banta*, 118 N. Y. 538. *Fisk v. Tank*, 12 Wis. 276. *Mullett v. Mason*, L. R. 1 C. P. 559. *Smith v. Green*, 1 C. P. D. 92. *Randall v. Newson*, 2 Q. B. D. 102. *Cory v. Thames Ironworks & Shipbuilding Co.* L. R. 3 Q. B. 181. The defendant must be held to have contemplated, as a direct result of the sale, the keeping of the horse by the plaintiffs for a sufficient length of time to afford a reasonable test of his capacity, and if he turned out to be unfit for the purpose for which he was bought, the expense of so keeping him would be a loss consequent upon and naturally resulting from the defendant's conduct. What under all the circumstances would be a reasonable time was a question for the jury, upon which it is to be assumed that suitable instructions were given to them.

The allegations in the declaration were sufficient to include the expense of keeping.* Indeed, we do not understand the defendant to contend now that they were not.

Exceptions overruled.

* The declaration contained two counts, in the first of which it was alleged that the "plaintiffs did expend large sums in the care and maintenance of said stallion until they could use and test him as aforesaid as a breeder, and did attempt to use him as a breeder as aforesaid, and did thereby incur and expend large liabilities and sums." In the second count it was alleged that the plaintiffs "did expend large sums of money in his care and maintenance, and did incur large liabilities arising out of their belief that he was of such value as a breeder, and did attempt to use him as such."

WALTER H. GRAEF vs. HENRY O. BERNARD.

Worcester. October 3, 1894. — October 19, 1894.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

*Jurisdiction — Foreign Judgment as a Bar to a Recovery in this Commonwealth
— Motion to reopen — Replication — Vacating Judgment.*

The plaintiff brought an action against the defendant in another State of which they were both citizens, and on the same day another action, for the same cause, in this Commonwealth, by attachment of the defendant's property. Judgment in the first named action was entered in the plaintiff's favor while the proceedings in this Commonwealth were still pending. *Held*, that, while the defendant had the right to set up the judgment so obtained in bar of the plaintiff's right to recover in the action here, it was equally competent for the court, upon the plaintiff's application to reopen the case after the hearing and before the finding, and allow him to file a replication setting up that the judgment had been vacated and was no longer in force, and to introduce evidence of that fact, and to find, if the evidence warranted it, that the judgment in that case had been vacated, and that the plaintiff was entitled to judgment in the action here.

CONTRACT, on an account annexed. Writ dated June 27, 1893. The answer was: 1. A general denial. 2. That the plaintiff should prove the sale and delivery of the goods as set forth in his declaration. 3. That the plaintiff had since the bringing of the action recovered judgment in the State of New York, on July 17, 1893, for a certain sum, which judgment was for the same cause of action as that set forth in the plaintiff's declaration, and for the same goods as those therein alleged to have been sold to the defendant, and that the judgment was still in force.

At the trial in the Superior Court, without a jury, before *Fessenden, J.*, it appeared that both the plaintiff and the defendant were citizens of the city and State of New York, and that the defendant had carried on business in the county of Worcester, and had property therein, which was attached on the writ in the present action. It was agreed that judgment should be entered for the plaintiff for a certain sum and interest, unless the court should hold that the judgment of the New York court which was put in evidence was a bar to the plaintiff's recovery. No objection was made to the form of the proof of the record;

the parties to this and the New York actions and the causes of action, were the same, and no other evidence was introduced at the trial. Before the judge had rendered his decision, on December 29, 1893, the plaintiff moved for a reopening of the hearing, on the ground that the judgment in the New York court referred to was on December 26, 1893, wholly vacated as of the time when the same was rendered, and filed a replication to that effect. The defendant objected to the allowance of the motion, and the judge, after argument, reserved his decision, and, against the defendant's objection, received evidence *de bene* of the proceedings of the New York court, which evidence was a copy of the record of the court, to the effect that the judgment and execution issued thereon were "vacated and set aside, *nunc pro tunc*, without prejudice, however, to any of the rights of the plaintiff, and without prejudice to the claims or indebtedness owing by Henry O. Bernard, the defendant, to Walter H. Graef, the plaintiff, upon which the said judgment was obtained." The defendant appealed to the General Term of the City Court of New York, and the order appealed from was affirmed, with costs.

The judge allowed the plaintiff's motion, received the evidence, and rendered judgment for the plaintiff. The defendant alleged exceptions.

J. E. Beeman, for the defendant.

F. P. Goulding, (*F. L. Dean* with him,) for the plaintiff.

MORTON, J. The rights of parties are generally determined as of the time when the action is begun. And it is necessary that it should be so. That the rule is not an invariable one, however, is shown by the numerous instances in which, by the plea of *puis darrein continuance*, facts occurring after the commencement of the action are set up and allowed to operate in bar of it. And it is expressly provided by Pub. Sts. c. 167, § 26, that "an answer or replication may allege facts which have occurred since the institution of the suit." If a declaration, answer, or replication has been filed, a supplemental one may be made by leave of court, alleging material facts that have occurred since the former declaration, answer, or replication. The statute is wider in its scope than the plea of *puis darrein continuance*. Strictly speaking, that can only be availed of in

regard to matters occurring since the last continuance. The statute is not so limited. The suit in New York, on the judgment in which the defendant relies, was begun on the same day as this action, viz. June 27, 1893. Judgment in the New York action was entered in the plaintiff's favor on July 17, 1893. There can be no doubt that the defendant had the right to set up the judgment so obtained in bar of the plaintiff's right to recover in this action. It is equally clear, we think, that it was competent for the court, upon the plaintiff's application, to reopen this case after the hearing and before the finding, and allow him to file a replication setting up that the judgment had been vacated and was no longer in force, and to introduce evidence of that fact, and to find, if the evidence warranted it, that the judgment in that case had been vacated, and that the plaintiff was entitled to judgment in this action.

Exceptions overruled.

INHABITANTS OF EASTHAMPTON vs. DAVID HILL.

Hampshire. September 18, 1894. — October 20, 1894.

Present: ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

By-law of Town — Penalty — Liability of Owner for Failure to remove Snow from Sidewalk.

A by-law of a town provided that "the tenant, occupant, and in case there shall be no tenant, the owner, . . . having the care of any land or building fronting on any street . . . where there is a concrete . . . sidewalk, shall after the ceasing to fall of any snow . . . within twenty-four hours cause the same to be removed," or "shall sprinkle thereon sand," etc.; and in default thereof should pay a certain penalty. In an action against the owner to recover the penalty for failure to remove the snow, it appeared that his house was divided into two tenements, one of which was occupied by a tenant and the other was vacant; that the tenant, as tenant, had no control over the vacant tenement and the land in front, and that by an agreement with the owner the tenants were to clear the snow and ice from the sidewalk, and there were no limits fixed as to how much each should clear off. *Held*, that the word "building" in the by-law was sufficient to describe the part of the house which had been vacated by the defendant's tenant, and which at the time when the snow was unremoved was in the care of the defendant as owner; that it was the owner's duty to attend to the sidewalk, and his failure so to do rendered him liable; that the by-law in terms

applied to a person having the care of any land fronting on a street, as well as to the person having the care of the building; and that if one tenement became vacant it was not the duty of the remaining tenant, as tenant, to clear the entire sidewalk.

TORT, under the Pub. Sts. c. 58, § 9, to recover the penalty provided by a by-law of the plaintiff town for failing to remove snow from the sidewalk adjoining the defendant's tenement and land fronting on Pleasant Street in that town.

The by-law is as follows:

"1st. The tenant, occupant, and, in case there shall be no tenant, the owner, or person, or corporation having the care of any land or building fronting on any street in the village where there is a concrete, stone, brick, or plank sidewalk, shall, after the ceasing to fall of any snow, ice, or sleet, within twenty-four hours cause the same to be removed from such sidewalks, and if the same cannot be wholly removed shall sprinkle thereon sand or other proper substance, so that such sidewalk shall be safe for travel; and in default thereof shall forfeit and pay a penalty of two dollars.

"2d. The selectmen are hereby instructed to enforce this law in any case of its violation called to their attention, agreeably to section 9 of chapter 58 of the Public Statutes."

Trial in the Superior Court, without a jury, before *Dewey, J.*, who reported the case for the determination of this court, in substance as follows.

The defendant owned about two acres of land in one parcel, upon which were two houses, each used for two tenements, which tenements fronted upon Pleasant Street, and stood about twenty feet back from a concrete sidewalk thereon; also a single tenement house, standing about one hundred and thirty feet back from the sidewalk, but connected with the street by a driveway and plank walk. The houses were not built as two-tenement houses, but were old-fashioned New England houses, with front door and hall and stairway in the middle, and rooms on each side. With each tenement was a small garden, the remaining land being occupied by the defendant, though not abutting on the street.

One tenement in one of the two-tenement houses was without a tenant from November, 1893, until February 8, 1894, during

which time the defendant had care of the same as owner, but the defendant never cleaned snow and ice from the sidewalk in front of the lot. By understanding and agreement with him the tenants were to do this, and there were no limits fixed as to how much each should clean off. All the other tenements had tenants.

Snow ceased falling on the concrete sidewalk on January 27, 1894. From that part of the sidewalk in front of the vacant tenement and that part crossed by the driveway the snow was not removed within twenty-four hours (or at any time) after the snow had ceased to fall on the sidewalk, though the same could have been removed, and in front of the occupied tenement was removed by the tenant thereof, who declined to remove the snow in front of the vacant tenement. This tenant used the land in the rear of the whole house for a clothes-yard, and for other purposes.

There was evidence that the house in question had one front door and one hall, which door and hall were used in common when both tenements had tenants.

The judge ruled, at the request of the defendant, that upon the evidence the plaintiff could not, under the by-law, recover, and found for the defendant.

If the ruling was correct, judgment was to be entered for the defendant; otherwise there was to be a new trial.

A. J. Fargo, for the plaintiff.

C. N. Clark, for the defendant.

LATHROP, J. We have no doubt that the word "building," in the by-law of the plaintiff town, is sufficient to describe the part of the house which had been vacated by the defendant's tenant, and which was then in the care of the defendant as owner. If the by-law in question had contained the words "building or tenement," the word "building" might have to be construed as meaning the entire building, in order to give effect to the word, as was held in *Commonwealth v. McCaughey*, 9 Gray, 296. But where the word "building" alone is used, it is broad enough to include a tenement. See *Commonwealth v. Lee*, 148 Mass. 8; *Commonwealth v. Quinlan*, 153 Mass. 483.

The defendant's house was divided into two tenements, one of which was occupied by a tenant, and the other was vacant.

The tenant, as tenant, had no control over the vacant tenement, and it was conceded at the argument that he had no control over the land in front. It was the owner's duty to attend to the sidewalk; and his failure to do so renders him liable. And the by-law in terms applies to a person having the care of any land fronting on a street, as well as to the person having the care of a building.

It is stated in the report, that, by an understanding and agreement with the owner, the tenants were to clear the snow and ice from the sidewalk; and there were no limits fixed as to how much each should clear off. We do not understand by this that, if one tenement became vacant, it was the duty of the remaining tenant, as tenant, to clear the entire sidewalk.

In *Commonwealth v. Watson*, 97 Mass. 562, there were two tenants who occupied separate parts of one estate, and had the sole control of it, the owner being merely a boarder with one of them. The case differs from the one at bar.

According to the terms of the report, there must be a

New trial.

EDGAR J. OUILLETTE vs. OVERMAN WHEEL COMPANY.

Hampden. September 25, 1894. — October 20, 1894.

Present: ALLEN, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Instructions — Burden of Proof — Presumption — Negligence — Due Care — Expert — Question as to Admissibility of Interrogatory rendered Immaterial.

If the instructions given to the jury by the presiding justice cover the rulings asked for by the defendant, and state the law correctly, the defendant has no ground of exception.

In an action for personal injuries occasioned to the plaintiff while in the defendant's employ by the falling on him of shafting and pulleys fastened to beams overhead in the defendant's factory, the judge refused to instruct the jury, as requested by the defendant, that "No burden rests on the defendant to show or explain the cause of the accident," and instructed them that the burden was on the plaintiff throughout; that under some circumstances the plaintiff's injury, especially where the means of explanation were more likely to be within the control of the defendant than of the plaintiff, was itself evidence of negligence; that the breaking of the machinery in connection with a failure of one who pre-

sumably can explain to give explanation might be evidence of want of care in providing it, but this principle had no application to the case; and that the injury, though caused by the breaking of the machinery, was not in itself evidence that the defendant was wanting in due care to provide a reasonably safe place for the plaintiff to work in. The defendant further asked the judge to instruct the jury, "The measure of the defendant's duty was to exercise due care in providing instrumentalities for the plaintiff to use, and in providing a safe place in which the plaintiff was to work, and *prima facie* it is presumed to have done so." The judge gave the first portion, including the word "work," but declined to give the rest, and instructed them: "Negligence on the part of the defendant must be proved. It cannot be presumed. It is so far a presumption that the defendant discharged its whole duty, that, until it is proved otherwise, it is to be taken that it did so." *Held*, that the defendant had no ground of exception.

In an action for personal injuries occasioned to the plaintiff while in the defendant's employ by the falling on him of shafting and pulleys fastened to beams overhead in the defendant's factory, one of the issues was whether the defendant had properly inspected the shaft, and he introduced testimony to show that he had done so before the shaft was started, and from day to day while it was running, the witnesses testifying that the shaft ran without vibration, and that standing on the floor they could see if it or the pulleys oscillated an eighth of an inch. The defendant then called an expert, and asked him, "Can you state whether or not an experienced person, looking at a shaft revolving, and pulleys upon that shaft revolving two hundred and fifty revolutions a minute, whether a person can see whether it ran true or not?" and also, "Whether a person standing upon the floor, an experienced person standing upon the floor and watching this, can see any oscillation?" Both questions were excluded. *Held*, that even if it did not appear what the answer to the last question would be, it was to be inferred that it would be to the effect that any oscillation could have been seen by an experienced person in that position; and, assuming that the first question was objectionable in form, the last should have been admitted, as the subject was not one within the common experience of men.

Where a new trial was granted on account of the exclusion of an interrogatory to an expert, the court said that it was not necessary to consider whether an interrogatory to another expert, which had also been excluded, was admissible at the stage of the examination at which it was put, even if it would have been admissible earlier, upon which it expressed no opinion, and that at the new trial it might become immaterial, or might arise under different circumstances.

TORT, for personal injuries occasioned to the plaintiff while in the defendant's employ in its factory by the falling upon him of shafting and pulleys fastened to beams overhead by two hangers.

The declaration, which was at common law, alleged that the defendant negligently failed to furnish the plaintiff with a reasonably safe and suitable place in which to work, with reasonably safe and suitable instrumentalities with which to work, and to give him proper instructions and warnings regarding the dangers attending the work, all of which it was his duty

to do; and by reason thereof the plaintiff while in the line of his employment and in the exercise of due care was injured.

At the trial in the Superior Court, before *Mason*, C. J., there was evidence tending to show that the plaintiff's duty called him to occupy a certain place in a room assigned to him by his foreman, but not to use any of the machinery, and that he did not use any of it; that over the place where the plaintiff was working a steel shaft two and fifteen sixteenths inches in diameter was placed, supported by cast iron hangers fixed to the timbers overhead, the shaft being about eleven feet above the floor where the plaintiff was; that upon this shaft were two iron pulleys, one fifty and the other thirty inches in diameter; and that one of these pulleys was driven by a belt leading from a pulley on the main shaft, and the other supplied power by means of a belt to run a fan.

The plaintiff did not testify as to the causes which led to his injury, except so far as to state the place where he was at work, and his assignment there by the foreman. The plaintiff contended, and introduced evidence tending to show, that the shaft and the machinery connected therewith, and its method of attachment to the timbers of the floor above, were improper, insufficient, and insecure, and that the defendant ought to have known that they were not sufficient and safe.

The defendant produced witnesses who testified that there was a latent defect or flaw in the shaft which could not be discovered on an ordinary inspection, but the plaintiff's witnesses testified that there was no such flaw. It became the subject of material inquiry whether the defendant had exercised proper inspection at the time that the shaft and other machinery referred to were put up, and during the time that they were running before the injury. The defendant called witnesses who testified to their inspection of this machinery, both before it was started and while it was running, and they described their method of inspection at the time when the shafting was put up, and their observation by eye of the same from the floor of the room from day to day where the plaintiff worked, and directly under the machinery. They further testified that the machinery was adjusted properly, and ran so far as their observation went without the least vibration or oscillation, and that they could,

standing below the shaft, see if the shaft or the pulleys oscillated one eighth of an inch.

One J. W. Cumnock was called by the defendant as a witness to testify as to the character, sufficiency, and safety of the machinery in question. He was a person of long and extensive experience in dealing with machinery of that character, was admitted to be an expert, and had never seen the shafting, pulleys, and mechanism until the same were produced at the trial; and there was no evidence that he had ever been into or seen the room in which they were placed. After he had fully described the machinery in question as it appeared in court, and had testified as to its character and sufficiency and as to the strength and fitness of the materials used, and that there was no defect in the shaft, hangers, or other machinery connected therewith which could be detected upon an ordinary inspection, but that the break was caused by a latent defect or flaw in the shaft, he was asked: "Can you state whether or not an experienced person looking at a shaft revolving and pulleys upon that shaft revolving two hundred and fifty revolutions a minute, whether a person can see whether it ran true or not?" This question was objected to by the plaintiff, and excluded by the judge; and the defendant excepted.

He was then asked: "Whether a person standing upon the floor, an experienced person standing upon the floor and watching this, can see any oscillation?" This question was likewise objected to, and excluded; and the defendant excepted.

The shaft was supported by hangers seven and a half feet apart from centre to centre, and several witnesses testified that this was a safe and ordinary construction.

One Charles L. Pepper, the defendant's superintendent, was called by the defendant as an expert witness. After the witness had said, on cross-examination, that if three hangers had been used the liability to accident would have been decreased, he was inquired of as to the need of a third hanger to support the shaft, and was then asked, "Would that hanger prevent the shaft breaking if there were a flaw in it?" On the plaintiff's objection, the judge excluded the question; and the defendant excepted.

The judge gave general instructions in regard to the case,

which were not objected to; and instructed the jury that the plaintiff must not only prove due care on his part and the injury to himself, but must go further and prove negligence on the part of the defendant, and that that negligence caused the injury; that the proof of the accident is not, taken by itself, evidence of the defendant's negligence; that if the injury to the plaintiff happened because of a defect or flaw in the shaft, which defect or flaw could not have been discovered on an ordinary inspection, and the defendant had no warning or knowledge of such defect or flaw, then the defendant would not be liable; that if the shaft had no defect or flaw in it, and was such a shaft as was ordinarily used for such purposes as it was applied to by the defendant, and was put up and used in the ordinary way, and the shaft broke while being so used, the defendant not knowing or having reasonable cause to know of any insufficiency in the shaft, then the defendant would not be liable.

The defendant asked the judge to rule as follows: "No burden rests on the defendant to show or explain the cause of the accident"; but the judge declined so to rule.

The judge instructed the jury that the burden of proof was on the plaintiff, and continued upon him throughout; that under some circumstances the plaintiff's injury from the breaking of the defendant's machinery, especially where the means of explanation are more likely to be within the control of the defendant than of the plaintiff, is itself evidence of negligence. The breaking of the machinery in connection with a failure on the part of one who presumably can explain to give explanation may be evidence of want of care in providing it. But this principle has no application to this case. The injury, though caused by the breaking of the defendant's machinery, is not in itself evidence that the defendant was wanting in due care to provide a reasonably safe place for the plaintiff to do his work in.

The defendant further asked the judge to instruct the jury: "The measure of the defendant's duty was to exercise due care in providing instrumentalities for the plaintiff to use, and in providing a safe place in which the plaintiff was to work, and *prima facie* it is presumed to have done so." The judge gave to the jury the first portion as prayed for, down to and including the word "work," but declined to give the rest, and instructed them:

"Negligence on the part of the defendant must be proved. It cannot be presumed. It is so far a presumption that the defendant discharged its whole duty, that, until it is proved otherwise, it is to be taken that it did so."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

G. D. Robinson, for the defendant.

W. H. Brooks, for the plaintiff.

MORTON, J. The instructions given by the court covered the rulings asked for by the defendant, and stated the law correctly. Whether the defendant was or was not liable was matter of proof. The burden was on the plaintiff. If he failed for any reason to sustain it, the defendant was entitled to a verdict, not because *prima facie* it appeared that there had been no neglect on his part, but because the plaintiff had not shown any. So far as any presumption existed, it was that the defendant performed its duty, as the court told the jury. The jury were also told in effect that under the circumstances of this case the breaking of the machinery was no evidence of neglect on the part of the defendant; which was going further than to say, as the defendant asked the court to rule, that the defendant was not bound to explain the cause of the accident.

We think, however, that the question to the witness Cumnock should have been admitted.

One of the issues at the trial was whether the defendant had properly inspected the shaft. The defendant introduced testimony tending to show that it had done so before the shaft was started, and from day to day while it was running. The witnesses testified, amongst other things, that the shaft ran without vibration, and that standing on the floor they could see if it or the pulleys oscillated an eighth of an inch. As bearing further on the sufficiency of the inspection made by the defendant, it called the witness Cumnock, who had had a long experience in dealing with machinery of that kind, and who was admitted to be an expert. The defendant's counsel asked him the following question: "Can you state whether or not an experienced person, looking at a shaft revolving, and pulleys upon that shaft revolving two hundred and fifty revolutions a minute, whether a person can see whether it ran true or not?" This was objected

to and excluded, and the defendant's counsel asked the further question, "Whether a person standing upon the floor, an experienced person standing upon the floor and watching this, can see any oscillation?" and this also was excluded. It does not appear very clearly what the answer would have been, but it is fairly to be inferred we think that it would have been to the effect that any oscillation could have been seen by an experienced person in that position; and, assuming that the first question was objectionable in point of form, we think that the last should have been admitted. The subject was not one within the common experience of men. The jury could not tell whether an oscillation in a shaft of the size of this and as far above the floor, and with two heavy pulleys on it revolving at the rate of two hundred and fifty revolutions a minute, could be seen by an experienced person from the floor. Only a person of skill in the business, or familiar with the running of such machinery, would know. *New England Glass Co. v. Lovell*, 7 Cush. 319. *Curtis v. Gano*, 26 N. Y. 426. See Rogers, Expert Test. (2d ed.) § 109 *et seq.*, for collection of cases. The question did not come fairly within the cases in which it has been held that the extent to which testimony may be accumulated, or allowed in rebuttal, is within the discretion of the court. *Cushing v. Billings*, 2 Cush. 158. *Ashworth v. Kittridge*, 12 Cush. 193. *York v. Pease*, 2 Gray, 282.

As to the question put to the witness Pepper, it is not necessary for us to consider now whether it was admissible at the stage of the examination at which it was put, even if it would have been admissible earlier, upon which we express no opinion. As there must be a new trial on account of the exclusion of the question to the witness Cumnock, the question whether the interrogatory to Pepper was admissible may become immaterial, or may arise under different circumstances.

Exceptions sustained.

HENRY J. BOWERS vs. CONNECTICUT RIVER RAILROAD COMPANY.

Hampshire. September 18, 1894. — October 24, 1894.

Present: ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

Personal Injuries — Negligence — Count at Common Law — Employers' Liability Act — Defective Condition — Evidence.

If, in an action for personal injuries occasioned to the plaintiff while in the employ of a railroad corporation, there is no sufficient evidence that the defendant had failed to make proper provision for the inspection of its cars, but it appears that the neglect, if any, was that of a fellow servant, the plaintiff cannot recover under a common law count in his declaration which alleges the duty of inspection on the part of the defendant, and injury to the plaintiff in consequence of its failure to inspect.

A car in use by or in the possession of a railroad company is to be considered a part of the ways, works, or machinery of the company using or having the same in possession, within the meaning of St. 1887, c. 270, whether such car is owned by it or by some other company.

In an action for personal injuries occasioned to the plaintiff, while in the employ of a railroad corporation coupling cars, by reason of defective drawbars which had not been discovered or remedied owing to the negligence of a person in the service of the defendant intrusted with the duty of seeing that the cars were in proper condition, there was evidence that there was an opportunity for too much lateral motion of the drawbars, and especially of the drawbar on the stationary car, and also that the failure to discover or remedy the alleged defect was negligence on the part of the defendant's inspectors of cars. *Held*, that the judge erred in directing a verdict for the defendant, and that the case should have been submitted to the jury.

If, in an action for personal injuries occasioned to the plaintiff while in the employ of a railroad corporation, a count in the declaration alleges that the accident was due to a defective condition which had not been remedied or discovered owing to the negligence of the defendant, or of some person in its employ intrusted with and exercising superintendence, or whose sole or principal duty was that of superintendence, there is no case for the jury if there is no evidence of negligence on the part of any superintendent or person exercising superintendence for the defendant.

TORT, for personal injuries occasioned to the plaintiff while in the defendant's employ as a freight brakeman. The declaration was in three counts. The first count, which was at common law, alleged that it was the duty of the defendant properly to inspect the cars of other companies coming upon its road, and that it had failed so to do, in consequence whereof the plaintiff

was injured. The second count, which was under St. 1887, c. 270, alleged that the plaintiff was injured while attempting to couple "two freight cars, both of which were defective in not having suitably constructed and adjusted drawbars and drawbar pockets or sockets, whereby the head of one drawbar did slip out of place and by the other drawbar, and thereby caused the injury aforesaid; and these cars were used in the business of the defendant, and these defects arose from, or had not been discovered or remedied owing to, the negligence of the defendant, or of some person or persons in its employ intrusted with the duty of seeing that such cars were in proper condition." The third count, which was also under St. 1887, c. 270, alleged a defective condition identical with that stated in the second count, and then alleged that "this defective condition was not remedied or discovered owing to the negligence of the defendant, or of some person in its employ intrusted with and exercising superintendence, or whose sole or principal duty was superintendence."

Trial in the Superior Court, before *Dewey, J.*, who reported the case for the determination of this court, in substance as follows.

The plaintiff testified that the accident occurred on December 8, 1892, while he was in the employ of the Connecticut River Railroad Company as a yard brakeman; that he had been so employed one week and three days, and that he was one of a number of men employed in switching cars to make up a train which was about to go north, and the train had been to the north end of the yard after water, and three cars were attached to the engine. These cars were backed down against a Delaware and Hudson coal-car, and he made an attempt to couple these cars together; and the drawbars slipped by and caught his hand. The car nearest to the coal-car was a Michigan Central box-car, and both of them had come over from the Fitchburg Railroad on that morning or the previous night. He further testified that he was employed by one Benjamin, a train-master, and had not received any instructions as to how to shackle the cars together; that in attempting to shackle the cars together he went between them, facing the Delaware and Hudson coal-car, with his right hand upon the coal-car, with one foot inside the rail, and attempted to raise the link with his left hand, and his arm was caught between the dead wood and the head-block; that he

could not reach the pin without stepping one foot inside the rail; that that was the way in which he was accustomed to shackle cars; that the Michigan Central car was loaded with corn, and the Delaware and Hudson car with coal, when received by the defendant; that they were being put into the train to go north over the Connecticut River Railroad; and that at this time the conductor was near the north end of the yard throwing a switch. On cross-examination he testified that he had previously worked nine or ten months for the Fitchburg railroad as yard brakeman, doing the same kind of work, and had experience in coupling cars under the circumstances that existed when he was injured; that the switch gang consisted of five men working in the Greenfield yard, and he was "tail-end man"; and that he could not tell the height of the bunter on the Delaware and Hudson coal-car or on the Michigan Central box-car, but thought that they were nearly the same height,—did not think they would vary an inch, but thought the bunter of the coal-car was "a little mite higher than the other." He further testified that neither drawbar went under the other, but they slipped by on the side; that the one the link was in went by; that the link was in the drawbar of the Delaware and Hudson car; that it was straight; that he had to hold it and get it into the bunter of the grain-car as it came down; that the drawbar was not opposite the other; that the grain-car struck on the east side; that he was on the west side, with his face towards the Delaware car; that he could not tell how the cars were going to strike; that the car was coming quite fast, though no faster than usual; that he got the pin into the grain-car, and the link slid right by, striking on the east side of the drawbar; that he could not steer it into the receptacle, as he did not have time to pull a drawbar over there then; that he did not have time to get out of the way, and that he got caught, as there was too much play in the drawbars. He further testified, on cross-examination, that he never saw a drawbar swing before over an inch; that he never saw drawbars go by in this way before; that if he had got the link in that was fastened to the coal-car, it would not have slipped by unless the link broke; that he should say that there was a small drawbar where there should have been a big one, and that the fault of the company was due to the fact that there was too

much play between the drawbars; that he did not know, and he only so heard; that he did not know of any reason why the defendant company was at fault; and that the track on which all the cars in question were was perfectly straight.

One Woodlock, called by the plaintiff, testified that he found the drawbars locked by each other, and examined them and found that there was too much play in the drawbar; that there was most play in the pocket of the coal-car, — all of four inches; that there was not quite so much play in the box-car; that he had been employed in railroad business for about eight years, and most of the time as a freight brakeman; that he had a chance to observe the play of drawbars during that time, and that there ought not to be over an inch. On cross-examination he testified that cars could not be hauled around curves unless they had some play, or unless they had skeleton drawbars, which none of these cars had; that there was more than one inch play in this case, and more than was necessary; that he saw the cars in the condition in which they were left; that the drawbars were locked by each other; that he was not observing with regard to the height of the drawbars from the ground, but thought one drawbar was probably two inches higher than the other; that the play of the drawbars was visible to any one who could look at it or inspect it; and he had never seen cars slip by in this way before; that there were inspectors there, Young and Jones, but that he did not see either of them inspect the cars; and that he took particular notice that the pocket was nine inches wide, and the drawbar in it was only five inches, although he did not take exact measurements, and the pocket was too wide for the drawbars that were in there. He further testified that the mark which indicated that cars had been inspected was the letter "H" as a station mark, with the day of the month added; that he went on each side of the car, and saw no such mark on the cars in question. And on re-cross-examination he testified that he was not looking for those particular marks, and they might have been there for all he knew.

One Betters testified that he was employed as a switchman in the Greenfield yard on the day of the accident and was at the place a few minutes after the accident occurred; that the drawbars were slipped by each other on the side; that he could not

say just how much space there was between the drawbars and the socket, but it looked as though there was too much, as though the wrong drawbar had been put in ; that he knew the inspection mark which was put upon the cars with chalk to show that they had been inspected, — for that day it would be “8 H” ; that he did not notice any such marks on the cars ; and that he noticed the amount of play in the pocket of the drawbars, and as near as he could say there was four inches play on the Delaware and Hudson car, and two inches play on the other car.

Woodlock, being recalled, testified as follows :

“ Q. Did you know what the inspection mark was on that day?

A. The letter ‘H’ was the station mark, with the date of the month.

“ Q. So that the inspection mark would be what? A. ‘8 H.’”

He further testified that he went both sides of the car, and did not see any such mark, and that he did not notice any marks at all on either car. On cross-examination he testified that his attention was not called to the marks ; that he was not looking for them ; that he did not know whether they were there or not, and that they might have been there for all he knew.

One Jones, called by the plaintiff, testified that he was employed under one Young as foreman in general inspection and repairing of cars ; that he was employed at Greenfield a part of the time, and was at work there on the day of the accident ; that the proper inspection mark for that day, if the cars had been inspected, was “8 H” on the opposite corners of the cars ; that he could not swear whether the cars were or were not inspected on that day ; that in the inspection of cars only Young and Jones were employed, and when inspecting one went on one side and one on the other, — Young on the east side and Jones on the west ; that they did not look particularly at the yoke to see how much play there was ; that if the drawbar and the bolts that held the yoke or strap were sound, they let the car go ; and to the question, “ Can you say whether or not you looked at either of these cars to see how much play there was?” he answered, “ I could not swear that I ever saw the cars.”

At the close of the plaintiff’s evidence, the judge, at the defendant’s request, directed a verdict for the defendant, and reported the case for the determination of this court. If the

ruling was right, judgment was to be entered on the verdict; otherwise, a new trial was to be ordered.

J. C. Hammond, (*H. P. Field* with him,) for the plaintiff.

W. G. Bassett, for the defendant.

ALLEN, J. Under the first count, which was at common law, the plaintiff had no case for the jury. The common law duty of the defendant was that of inspection, and there was no sufficient evidence that it had failed to make proper provision for the inspection of the cars. The neglect, if any, was that of a fellow servant. *Mackin v. Boston & Albany Railroad*, 135 Mass. 201. *Keith v. New Haven & Northampton Co.* 140 Mass. 175. *Coffee v. New York, New Haven, & Hartford Railroad*, 155 Mass. 21.

The second count was under St. 1887, c. 270, and alleged, in substance, that the two cars were defective in not having suitably constructed and adjusted drawbars and drawbar pockets or sockets, whereby the head of one drawbar slipped out of place and by the other drawbar, and thereby caused the injury; and that the defects had not been discovered or remedied owing to the negligence of the defendant, or of some person or persons in its employ, intrusted with the duty of seeing that the cars were in proper condition.

The first question under this count is whether the cars were a part of the ways, works, and machinery used in the business of the defendant, within the meaning of the statute. They were loaded freight cars, which had come from other railroads, and which were to be hauled over a part of the defendant's railroad for the transportation of the freight contained therein, in the due course of the defendant's business. For the time being they were used in the defendant's business as a part of its rolling stock. The fact that the defendant did not own them is immaterial. The defendant was not bound to use them in its train if on inspection they were found to be unsafe. We think cars so used must be deemed to be a part of the defendant's works and machinery. *Coffee v. New York, New Haven, & Hartford Railroad*, 155 Mass. 21. *Gottlieb v. New York, Lake Erie, & Western Railroad*, 100 N. Y. 462. *Fay v. Minneapolis & St. Louis Railway*, 30 Minn. 231.

This is now so established by St. 1893, c. 359, passed since the plaintiff's cause of action arose.

We have then to consider whether there was any evidence for the jury of a defect in either car, which had not been discovered or remedied owing to the negligence of any person in the service of the defendant intrusted with the duty of seeing that the cars were in proper condition. It has heretofore been held by us that a drawbar of a locomotive engine, if placed too low, may be a defect. *Lawless v. Connecticut River Railroad*, 136 Mass. 1. In the present case the alleged defect is that there was an opportunity for too much lateral motion of the drawbars, and especially of the drawbar on the stationary car. The evidence of a defect in this particular certainly strikes us as slight, but too much space for play may be a defect, and we cannot say that it clearly appears, as matter of law, that there was no evidence for the jury.

If it is assumed that there was evidence for the jury of a defect, there was also evidence tending to show that the failure to discover or remedy it was negligence on the part of the defendant's inspectors of cars.

We cannot say that the plaintiff clearly appears to have brought the accident upon himself by his own carelessness, or that he must be held to have assumed the risk, or that he was not entitled to go to the jury on these questions.

Upon the second count, therefore, we think the plaintiff is entitled to a new trial.

Upon the third count there was no evidence for the jury, there being no evidence of negligence on the part of any superintendent or person exercising superintendence for the defendant.

Verdict set aside as to second count.

PATRICK H. BOWLER vs. DANIEL O'CONNELL & another.

Hampden. September 25, 1894. — October 24, 1894.

Present: ALLEN, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Master and Servant — Negligence — Act done by a Servant not as a Means or for the Purpose of performing the Master's Work.

An act done by a servant while engaged in his master's work, but not done as a means or for the purpose of performing that work, is not to be deemed the act of the master; and a person who is injured by such act, even if a negligent one, cannot recover damages of the master therefor.

TORT, for personal injuries occasioned to the plaintiff by being kicked by a colt belonging to the defendants. At the trial in the Superior Court, before *Mason*, C. J., the jury returned a verdict for the plaintiff; and the defendants alleged exceptions. The material facts appear in the opinion.

G. D. Robinson, (*T. B. O'Donnell* with him,) for the defendants.

W. H. Brooks, for the plaintiff.

ALLEN, J. In determining the legal question which is presented, we must assume that the jury adopted the plaintiff's view as to the circumstances attending the accident, and the testimony in contradiction thereof may be disregarded. With reference to this aspect of the case, the defendants asked an instruction to the jury that they were not responsible for the acts of Frank O'Connell, who was thirteen years of age and the son of one of the defendants, in his invitation to the plaintiff to take a ride upon the colt. The jury, however, were instructed that, if Frank O'Connell was the servant of the defendants in leading the colt from the stable to the defendants' yard, and while so leading the colt the plaintiff, who was between five and six years of age, was invited by Frank to ride, and was injured as he was going forward to accept the invitation, it would be competent for the jury to find that such invitation was within the scope of the employment of Frank; and again, that if, while Frank was leading the colt along or across the sidewalk or in the yard of the defendants, as the servant of the defendants, and, while so leading the colt in the line of his duty, he of

his own accord, and without the knowledge or authority of or direction from the defendants, invited the plaintiff to ride upon the horse, and while the plaintiff was attempting to go forward to accept the invitation of Frank he was injured, it was competent for the jury to find the action of Frank to be negligent, and such negligence to be within the scope of his employment.

The correctness of these instructions is to be determined with reference to the testimony in the case. The colt, it would seem, was about two years and nine months old. It was not harnessed into a wagon, but the boy Frank, who must be assumed to have been in the defendants' employment, was leading it from the watering tub to his stall, or to some other place. The defendants were contractors and excavators, and owned many teams. There was nothing to show that it was any part of their business, or that it was their habit or custom, to furnish horses or colts to ride, or to allow boys to ride upon them, or that they in any way ever authorized or permitted Frank to do this. Under this state of things, we are unable to see how the invitation by Frank to the plaintiff to ride upon the colt, although given while Frank was engaged in his employment, can be considered to be an act done in the course of such employment, or for the purpose of doing the business of his masters. The true test of liability on the part of the defendants is this. Was the invitation given in the course of doing their work, or for the purpose of accomplishing it? Was this act done for the purpose, or as a means, of doing what Frank was employed to do? If not, then in respect to that act he was not in the course of the defendants' business.

An act done by a servant while engaged in his master's work, but not done as a means or for the purpose of performing that work, is not to be deemed the act of the master. And under this rule, in view of the testimony, the defendants were not responsible for the consequences of Frank's invitation to the plaintiff to ride upon the colt. *Howe v. Newmarch*, 12 Allen, 49. *Hawks v. Charlemont*, 107 Mass. 414. *Hawes v. Knowles*, 114 Mass. 518. *Levi v. Brooks*, 121 Mass. 501. *George v. Gobey*, 128 Mass. 289, 290. *Wallace v. Merrimack River Navigation & Express Co.* 134 Mass. 95. *Walton v. New York Central Sleeping Car Co.* 139 Mass. 556. *Young v. South Boston*

Ice Co. 150 Mass. 527. *Mitchell v. Crassweller*, 13 C. B. 237. *Croft v. Alison*, 4 B. & Ald. 590. *Limpus v. London General Omnibus Co.* 1 H. & C. 526. *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259, 265. *Storey v. Ashton*, L. R. 4 Q. B. 476. *British Mutual Banking Co. v. Charnwood Forest Railway*, 18 Q. B. D. 714. *Snyder v. Hannibal & St. Joseph Railroad*, 60 Mo. 413, 419. *Morier v. St. Paul, Minneapolis, & Manitoba Railway*, 31 Minn. 351. *Davis v. Houghtellin*, 33 Neb. 582.

There may be cases where injuries result from accepting unauthorized invitations to ride which do not fall within the above rule, and are to be distinguished. Such cases may be found in the books, and need not be considered here, the circumstances being different.

Under the circumstances disclosed in the present case, it was not competent for the jury to find that the invitation given to the plaintiff to ride was within the scope of Frank's employment, and for this reason there must be a new trial.

Exceptions sustained.

MARY CASEY vs. CITY OF FITCHBURG.

Worcester. October 2, 1894. — October 24, 1894.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Personal Injuries — Due Care — Assumption of Risk.

If, in an action against a city for personal injuries occasioned to the plaintiff by falling into a trench alleged to have been negligently made and maintained by the defendant's servants, all the circumstances of the case show that the plaintiff thoroughly understood the risk he was running which led to the accident, he was not in the exercise of due care, and a verdict is properly ordered for the defendant.

TORT, for personal injuries occasioned to the plaintiff by falling into a trench alleged to have been negligently made and maintained by the defendant's servants. At the trial in the Superior Court, before *Bond, J.*, it appeared that the trench was dug for purposes of the defendant's water system on an estate occupied by one Ashline, with whom the plaintiff was a boarder.

At the close of the plaintiff's evidence, the judge, at the defendant's request, directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions. The facts material to the point decided appear in the opinion.

H. Parker, for the plaintiff, cited in his brief on the subject of due care the following cases: *Linnahan v. Sampson*, 126 Mass. 506; *Pomeroy v. Westfield*, 154 Mass. 462; *Fitzgerald v. Connecticut River Paper Co.* 155 Mass. 155, 161; *Mahoney v. Dore*, 155 Mass. 513, 518; *Norwood v. Somerville*, 159 Mass. 105; *Finnegan v. Fall River Gas Works Co.* 159 Mass. 311; *McGuinness v. Worcester*, 160 Mass. 272.

E. P. Pierce, for the defendant.

ALLEN, J. Without holding the plaintiff too strictly to her admission made in cross-examination, that she thoroughly understood the risk she was running, the circumstances of the case show the same thing. The distance from the house to the street was only about fifteen feet. The digging of the trench was begun about a week before the accident, and was continued from day to day. The main entrance to the house was obstructed by stones, so that the occupants had given up the use of the front door entirely. A ladder had been placed just south of where the trench entered the street, and persons going to and from the house were obliged to and did pass up and down this ladder, and over the piles of earth along the south side of the trench, using the kitchen door, which faced the street and was at the south end of the house. The plaintiff was well acquainted with the condition of things. She had gone out and in by this course once before on the evening of the accident. When she came in she noticed that it was very dark in the yard, and said that there ought to be a light there. Later in the evening, wishing to see her visitors safely to the sidewalk, they having said that they were afraid of the way, she went with them from the house without taking any light, and undertook to follow them to the street. She said in her testimony, "I poked my way as best I could." When asked why she did not take a light, she answered that she did not think of it. She was asked if a light could have been of any use that night, and answered, "I suppose if I had brought a light I would have been all right." It is apparent that she was not in the exercise of due care. In other cases,

somewhat resembling this in their facts, the evidence has been held proper to submit to the jury. In this case, on the plaintiff's own testimony, it seems to us that the ruling withdrawing the case from the jury was right. *Exceptions overruled.*

EDMUND BLISS vs. JAMES E. JOHNSON, administrator.

Hampden. September 26, 1894. — October 25, 1894.

Present: ALLEN, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Evidence of the Financial Reputation of the Lender of Money — Promissory Note signed by a Mark — Instructions.

While in an action for money lent, or in an action on a promissory note where the consideration is money lent, the defendant may show that the person claiming to have lent the money had no money to lend, and may show his financial condition, he cannot introduce evidence of his financial reputation.

In an action on a promissory note payable to the plaintiff on demand, and purporting to be signed by the defendant's intestate by his mark, the judge refused to instruct the jury, at the defendant's request, that the evidence from the paper itself should be given less weight than would attach to it if it purported to bear the genuine signature of the plaintiff's intestate, and instructed them that while he could not say, as matter of law, that the note would not carry as much force as if the intestate had signed it himself, if he were able to write his name, still it was a circumstance for them to take into account in passing upon the evidence. *Held*, that the ruling given was sufficiently favorable to the defendant, and that, if the jury were satisfied that the note was executed by the intestate by his affixing his mark to it, it could not be said, as matter of law, that it should be given less weight than if he had signed his name to it.

LATHROP, J. This is an action on a promissory note, dated June 26, 1875, for \$1,000, payable to the plaintiff on demand, and purporting to be signed by the defendant's intestate by her mark, in the presence of an attesting witness. The defence is that the note was not made by the intestate. On this issue the defendant was allowed to put in evidence tending to show that the plaintiff was not a person of means; that his real estate was mortgaged for its full value; that he was a frequent borrower of money in small sums, and at one time was refused a loan of \$900, because he had no security to offer excepting a second mortgage on real estate. The defendant was also allowed to

introduce in evidence any facts concerning the plaintiff's financial condition.

The first exception is to the refusal of the court to allow a witness called by the defendant to testify "what the plaintiff's reputation was as to being financially hard up and embarrassed at the time when the note purported to have been given." We are of opinion that this question was properly excluded.

In an action for money lent, or in an action on a promissory note where the consideration is money lent, it is competent for the defendant to show that the person claiming to have lent the money had no money to lend, and his financial condition may be shown. *Stebbins v. Miller*, 12 Allen, 591, 597. *Winchester v. Charter*, 97 Mass. 140. *Woodward v. Leavitt*, 107 Mass. 453, 458. *Higgins v. Andrews*, 121 Mass. 293. *Costello v. Crowell*, 133 Mass. 352. *Demeritt v. Miles*, 22 N. H. 523. *Wiggin v. Plumer*, 81 N. H. 251. *Dowling v. Dowling*, 10 Ir. C. L. 236.

In none of these cases was any attempt made to introduce evidence of the financial reputation of the lender; and we have found no case where such evidence has been admitted on the issue of the making of a loan. "Reputation," as said by Le Blanc, J., in *Higham v. Ridgway*, 10 East, 109, 120, "is no other than the hearsay of those who may be supposed to have been acquainted with the fact, handed down from one to another." The general rule is that hearsay evidence is to be excluded. To this rule there are certain well defined exceptions; but the case at bar does not fall within any of them.

There is a class of cases relied upon by the defendant, where evidence of reputation has been admitted, namely, where a conveyance is sought to be set aside as a fraudulent preference, and the question is whether the grantee had reasonable cause to believe that the grantor was solvent or insolvent at the time of the making of the conveyance. Here the inquiry is as to the state of mind or belief of the grantee, and it is said that any evidence is competent which tends to show the existence of such facts or circumstances as would naturally influence the mind of an honest and reasonable man in forming a conclusion in relation to the subject matter involved in the issue. *Carpenter v. Leonard*, 3 Allen, 32, per Bigelow, C. J. Another reason is stated by Mr. Justice Metcalf in *Bartlett v. Decreet*, 4 Gray, 111, 113,

who says that the testimony is admissible on the ground "that men's belief, as to matters of which they have not personal knowledge, is reasonably supposed to be affected by the opinions of others who are about them." See also *Lee v. Kilburn*, 3 Gray, 594; *Heywood v. Reed*, 4 Gray, 574; *Whitcher v. Shattuck*, 3 Allen, 319. And in *Sweetser v. Bates*, 117 Mass. 466, it was held that in such a case the general reputation of all the parties to the transaction, as to their credit and pecuniary responsibility, was properly admitted.

The case of *Buswell Trimmer Co. v. Case*, 144 Mass. 350, falls within the same exception. The action was replevin of a machine. The evidence was conflicting on the point whether the plaintiff delivered the machine on an absolute sale on credit, or on a conditional sale. Evidence that the purchaser's reputation for financial ability was poor was held to be competent to show that it was probable that credit was not given to him. See also *Lee v. Wheeler*, 11 Gray, 236.

The remaining exception relates to the refusal of the court to give the following instruction to the jury, requested by the defendant: "The evidence arising from the paper itself should be given less weight than would attach to it if it purported to bear the genuine signature of Mrs. Johnson." On this point the jury were instructed as follows: "The note does not purport to be signed on its face by Mrs. Johnson, by her writing her name. There is evidence tending to show that she could not write her name. While I cannot say, as matter of law, that it would not carry as much force as if she had signed it herself, as if she was able to write her name, still it is a circumstance for you to take into account in passing upon the evidence."

The ruling given was sufficiently favorable to the defendant. If the jury were satisfied that the note was executed by Mrs. Johnson by her affixing her mark to it, it could not be said, as matter of law, that it should be given less weight than if she signed her name to it.

Exceptions overruled.

J. E. Dunleavy & C. L. Gardner, for the defendant.

E. H. Lathrop, for the plaintiff.

ALPHEUS MERRITT vs. NEW YORK, NEW HAVEN, AND
HARTFORD RAILROAD COMPANY.

Hampshire. September 18, 1894. — October 26, 1894.

Present: ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

*Personal Injuries — Railroad — Evidence — Foreign Law — Due Care
— Action.*

In an action against a railroad corporation for personal injuries received by the plaintiff in alighting from the defendant's train in another State, the plaintiff being a resident of still another State, where the defendant has attachable property, evidence of the law of the last State, under which the plaintiff may, in a case of this kind, be deprived of a right to a trial by jury on the question of damages, and, upon the hearing before the judge, other matters in bar of the action may be presented to reduce the damages, is admissible to explain his conduct in bringing the action here instead of in the State of his residence.

It seems, that, if a passenger on a railroad train, which has stopped at a dimly lighted station in the evening, steps from the platform of a car to descend to the platform of the station after the train has actually started, but he does not know, and by the exercise of ordinary care and prudence cannot know, that it has started, and is injured, the fact that the train had so started would not of itself prevent the maintenance of an action for his injuries.

KNOWLTON, J. This is an action to recover damages for personal injuries received in alighting from one of the defendant's trains. The plaintiff was a passenger on a way train from South Norwalk, Connecticut, to Port Chester, New York, on the evening of December 20, 1892, and rode with his nephew in a seat facing forward near the middle of the car. As the train approached Port Chester, the brakeman called the station and passed out at the rear of the car, leaving the door open. After the car stopped, the plaintiff and his nephew walked backward from their seat to leave the car, and as the plaintiff alighted he fell and received the injuries for which this action is brought. The plaintiff testified that he left his seat just as the car came to a stop at the station, and that he proceeded rapidly to the rear door and to the platform of the car to alight, when, as he was stepping off to the platform of the station, the car started suddenly with a jerk, and without warning to him, and threw him violently to the platform of the

station. The defendant introduced evidence tending to show that the plaintiff did not rise from his seat until the train started to leave the station, after having stopped a reasonable time to allow passengers to get off and others to get on, and that he then passed to the platform of the car and got off the train while it was in motion, and in so doing fell and was hurt.

The plaintiff was at that time, and continued to be up to the time of the trial, a resident of Norwalk, Connecticut, and the defendant's counsel in his opening stated that the plaintiff could have brought his action where he lived, and that there was some reason why he did not wish to bring it where he was known and where witnesses could be had easier than here, that the defendant had property there open to attachment, and that the courts there were open to him. In cross-examining the plaintiff he asked him particularly about his residing at Norwalk, and his knowledge that the defendant had property and could be sued there, and in his closing argument to the jury he contended that there was some reason that did not appear why the plaintiff had brought his case here, and referred to the absence of the physician who attended the plaintiff after the accident, and spoke of the difficulty of the defendant's procuring witnesses here, and of the probability that, if the case had been tried in or near Norwalk, it would have been easy to bring testimony bearing on the extent of the plaintiff's injuries and his alleged inability to labor. The plaintiff, in reply to the defendant's case, before the close of the testimony, offered in evidence the General Statutes of Connecticut, 1888, § 1106, and also the cases of *Raymond v. Danbury & Norwalk Railroad*, 43 Conn. 596, *Daily v. New York & New Haven Railroad*, 32 Conn. 356, and *Carey v. Day*, 36 Conn. 152, for the purpose of showing that under the law of Connecticut the defendant, in a case of this kind, may be defaulted if it chooses, and that then the court proceeds to an assessment of damages, in which the plaintiff has no right to a trial by jury, and which is usually made without a jury, and that upon the hearing for the purpose of determining the damages the defendant is permitted to show that the plaintiff was not in the exercise of due care, or any other fact which would be a bar to the action, and that upon such a showing the damages may be reduced to a nominal sum. This evidence was

excluded subject to the plaintiff's exception. We are of opinion that it should have been admitted.* The facts relied on by the defendant in argument were used, and were intended from the beginning to be used, to discredit the plaintiff, who was the principal witness in his own behalf. The defendant's counsel has argued before us earnestly, and we think rightly, that these facts unexplained were proper for the consideration of the jury, as tending to throw suspicion and doubt on the plaintiff's case. In view of them the jury would be likely to give less credence to his testimony than if no such facts appeared. The plaintiff should have been permitted to prove any facts which would tend to explain his conduct in this respect. He testified that he left his claim with his lawyer in Norwalk to manage as he thought best, and that he sanctioned the bringing of the suit in Massachusetts. If it had been proved that by the law and practice in Connecticut the plaintiff might have been deprived of a right to trial by jury on the question of damages, and that upon the hearing before the judge other matters in bar of his action might be presented to reduce the damages, the evidence might, in the opinion of the jury, have relieved him from suspicion of dishonesty.

The plaintiff requested the court to rule as follows: "If the train had actually started when the plaintiff stepped from the platform of the car to descend to the platform of the station, but if the plaintiff did not know it had started, and by the exercise of ordinary care and prudence could not know that it had started, the fact that the train had so started would not, in and of itself, prevent recovery." This ruling the court declined to give, and the plaintiff excepted. We have no doubt that the request embodied a correct proposition of law, if there was evi-

* This evidence was excluded by the court, on the ground that it was immaterial; and the court said that the plaintiff had a right to bring his action in this State, and that the jury must be controlled by the rules governing this class of cases.

In the instructions to the jury the court said: "The plaintiff is rightfully here before you. The law gives him a standing here in court, and it gives the defendant a standing here. They are both properly before you. Whatever the motives of either may be, it is not for you to consider. They are rightfully and properly here before you, and it is your duty to ascertain, under the rules of the law, the result, after you have weighed the evidence."

dence in the case to make it applicable. *Brooks v. Boston & Maine Railroad*, 135 Mass. 21. It is a well established general rule, that a passenger who attempts to get on or off a railway train while it is in motion is not in the exercise of due care, and cannot recover for an injury to which his attempt contributed. *Lucas v. New Bedford & Taunton Railroad*, 6 Gray, 64. *Gavett v. Manchester & Lawrence Railroad*, 16 Gray, 501. *Harvey v. Eastern Railroad*, 116 Mass. 269. *England v. Boston & Maine Railroad*, 153 Mass. 490. But in a supposable case there may be circumstances which will relieve the passenger making such an attempt from the imputation of negligence. In *Gavett v. Manchester & Lawrence Railroad*, *ubi supra*, Chief Justice Bigelow says: "In the absence of anything to create excitement or cause alarm, the attempt to leave a car, while the train is in motion, by passing to the outside or stepping off, is *prima facie* evidence of carelessness."

In the present case the judge instructed the jury that, if the train started while the plaintiff was in the act of alighting from it, the fact that the train had so started before he stepped off the car would not prevent his recovery, "but if he went on the platform when the train was in motion he cannot recover; and the fact that he knew or did not know makes no difference." We cannot say, as matter of law, that in the evening, at a dimly lighted station, a train might not start so quietly that a passenger leaving the car in the exercise of ordinary care might go out on the platform and attempt to get off without knowing that the train was in motion. See *Brooks v. Boston & Maine Railroad*, 135 Mass. 21. If the statements of the plaintiff and his nephew are to be relied upon, or if the extreme statements of the witnesses for the defendant are taken as true, the facts of the case make the plaintiff's request inapplicable. But it is difficult to say, as matter of law, that the jury might not have taken a view of the testimony on both sides which called for an application of the rule embodied in the request. As there must be a new trial on the other ground, and as the evidence may not be exactly the same at another trial, it is unnecessary to consider this branch of the case further.

Exceptions sustained.

W. G. Bassett, for the plaintiff.

G. D. Robinson, for the defendant.

JAMES CORK & another vs. BARNEY BLOSSOM & another.

Bristol. October 26, 1892. — November 1, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP,
& BARKER, JJ.

*Injury to Property by Fall of Chimney on adjoining Premises — Negligence
— Action — Defence.*

If a person builds and maintains upon his premises a chimney so that, if it falls, it will fall upon and injure the adjoining premises, he is bound, in the exercise of proper care, to construct it so that it will withstand any gales which experience shows are reasonably to be anticipated in that locality, and he is liable for injuries caused by the neglect of his obligation in this respect; and the facts that he had the chimney examined by an experienced mason, who pronounced it safe, and relied upon his opinion, constitute no defence.

TORT, for injuries occasioned to the plaintiffs' property by the fall upon it of a chimney built and maintained by the defendants. At the trial in the Superior Court, before *Braley, J.*, the jury returned a verdict for the defendants; and the plaintiffs alleged exceptions. The facts appear in the opinion.

The case was submitted on briefs to all the judges.

A. N. Lincoln & A. H. Hood, for the plaintiffs.

J. F. Jackson & D. F. Slade, for the defendants.

MORTON, J. At the time of the injury complained of, the defendants owned, and operated, a saw and planing mill. The plaintiffs occupied a building for a reed and harness shop on the adjoining premises. In connection with their mill the defendants maintained a chimney, which, there was testimony tending to show, extended about forty feet above the roof of the mill. It was twenty-eight inches by thirty-two, and was built of a single course of brick about four inches thick, and was stayed on three sides, but not on the side towards the plaintiffs. Some time during the night of March 9 or early morning of March 10, 1891, the chimney fell, crushing in the roof of the building occupied by the plaintiffs, and injuring machinery and property belonging to them. The defendants introduced evidence tending to show that during the night of March 9th and early morning of March 10th there was a heavy gale, the wind ranging

from thirty-five to forty-eight miles an hour. The plaintiffs introduced testimony tending to show that gales of from thirty-six to forty-eight miles an hour were not infrequent in Fall River during the spring and winter months, and that the wind sometimes attained a greater velocity, having reached sixty miles an hour three times during the two years prior to the trial. There was testimony tending to show that the defendants caused the chimney to be examined by an experienced mason, who pronounced it all right, and that they relied on his opinion. There was other testimony on both sides as to the condition and safety of the chimney, to which it is not necessary now to refer.

The plaintiffs, in substance, requested the court to instruct the jury that the defendants were bound to build and maintain the chimney so that it would not fall and injure their neighbors, and were liable unless its fall was the result of inevitable accident, or of the wrongful acts of third persons which they could not reasonably anticipate; and that, in the absence of such proof, the fact that it fell was sufficient evidence of negligence, whether the defendants did or did not know that it was unsafe. The court declined to give these instructions, but instructed the jury, in substance, that ordinary care was the test; that the plaintiffs must show that, taking into account the location of the chimney and its proximity to the property of the plaintiffs, the defendants either did or omitted to do something which an ordinarily prudent man would not have done or omitted to do; that the defendants would not be liable for hidden defects which could not be discovered by the use of ordinary care; and that the fact that the defendants employed a competent mechanic to examine the chimney, and relied on his opinion, might be considered in passing upon the question of ordinary care.

The first question, and the fundamental one, is what, under the circumstances, was the duty of the defendants *quoad* the plaintiffs in regard to the erection and maintenance of the chimney.

As compared with the great majority of chimneys in cities and towns, the chimney was carried to an unusual height above the roof; though as compared with chimneys built for manufacturing establishments, or the high buildings in large cities, or steeples

and towers on churches and similar edifices, it was not uncommon, except perhaps in the mode of its construction. It was, however, a lawful structure. There is no law forbidding one from building to any height that he chooses on his own premises, and there is nothing to show that the chimney violated any city ordinance. But it evidently was built so near the line that when it fell it fell on to the adjoining premises. The proximate cause of its fall was the gale. If the gale had been of such unprecedented force that the experience of the people in that vicinity furnished no reason to anticipate its occurrence, then the doctrine of *vis major* or inevitable accident well might apply. But there was testimony to show, not only that such gales were not infrequent during the spring and winter months, but that they sometimes attained a greater velocity. The defendants were bound to have regard to these facts in building and maintaining their chimney. If they placed or maintained it so that, if it fell, it would fall upon and injure the adjoining premises, they were bound, in the exercise of proper care, to construct it so that it would withstand any gales which experience showed were reasonably to be anticipated in that locality. *Gray v. Harris*, 107 Mass. 492. To build and maintain a chimney or other structure so that it is liable to be blown down by a not infrequent gale, and so that, if it is blown down, it will fall upon and injure a neighbor's property, is like maintaining a building so out of repair that it is liable to fall, and ultimately does fall, upon and injure the adjoining premises. Such a building clearly would be a private nuisance. The defendants are not to be regarded as insurers, and consequently would not be liable if the fall occurred through a hidden defect which no foresight or examination could have discovered or prevented. And their liability may not be like that of those who keep animals whose known habit is to stray, or who keep dangerous animals which are a source of danger in themselves to others; or who store gunpowder in thickly settled neighborhoods, or who blast rocks on their own premises but under such circumstances that the flying fragments may damage others, and who in a sense may be said to impart to them their force and direction; or who construct buildings so that they will discharge snow, ice, or water upon adjoining premises or upon those passing in the street; or

who cause noise, or smoke, or dust, or fumes, or filth, which escape and injure the health, or materially interfere with the comfort and enjoyment of others. But parties erecting upon their own land chimneys, or walls, or other structures so situated that they may fall upon and injure the persons or property of others, are bound, at their peril, to use proper care in their erection and maintenance. By proper care is meant such degree of care as will prevent injuries from any cause except those over which the party would have no control, such as *vis major*, acts of public enemies, wrongful acts of third persons, and the like, which human foresight could not reasonably be expected to anticipate and prevent. If, for instance, one chooses to build upon a quicksand a structure so near the line that, if it falls, it will fall upon and injure the adjoining premises, or to hang out a lamp over the highway, it is reasonable and just that he should be bound, at his peril, to use all known devices to make the foundation secure, or to keep the lamp from falling.

The duty thus resting upon the defendants was one which they could not fulfil by the employment of a competent mason to examine the chimney, and by relying upon his opinion. As far as it went, it was an absolute duty, and nothing short of actual performance of it, or a fall of the chimney due to some one of the excepted causes, would excuse them. It is almost needless to add, that the fall of the chimney, unless caused by some one or more of the excepted causes, naturally would lead to the inference of an omission of duty in building or maintaining it. The following authorities may be cited, which support, in whole or in part, the principles above laid down as applicable to this case. The collection is not intended to be exhaustive. *Ball v. Nye*, 99 Mass. 582. *Wilson v. New Bedford*, 108 Mass. 261. *Gray v. Boston Gas Light Co.* 114 Mass. 149. *Mahoney v. Libbey*, 123 Mass. 20. *Gorham v. Gross*, 125 Mass. 232. *Mears v. Dole*, 135 Mass. 508. *Moreland v. Boston & Providence Railroad*, 141 Mass. 31. *Khron v. Brock*, 144 Mass. 516. *Smethurst v. Barton Square Church*, 148 Mass. 261. *Nichols v. Marsland*, L. R. 10 Ex. 255; S. C. 2 Ex. D. 1. *Tarry v. Ashton*, 1 Q. B. D. 314. *Nitro Phosphate & Odanis Chemical Manure Co. v. London & St. Katharine Docks Co.* 9 Ch. D. 503, 515. *Lawrence v. Jenkins*, L. R. 8 Q. B. 274. *Bensen v. Suarez*,

28 How. Pr. 511. *Mullen v. St. John*, 57 N. Y. 567. *Gagg v. Vetter*, 41 Ind. 228. *Scott v. Bay*, 3 Md. 431. *Tiffin v. McCormack*, 34 Ohio St. 638. *Cooper v. Randall*, 53 Ill. 24. *Cahill v. Eastman*, 18 Minn. 324. *Hannem v. Pence*, 40 Minn. 127. *Phinizy v. Augusta*, 47 Ga. 260. *Georgetown, Breckenridge, & Leadville Railway v. Eagles*, 9 Col. 544. *Kinnaird v. Standard Oil Co.* 89 Ky. 468. See also Wood, Nuisances, (3d ed.) §§ 109, 110, 118, 119. Pollock, Torts, 393, 394.

It is also to be observed, though we do not lay much stress upon it, that there is nothing to show that the chimney might not have been built farther from the plaintiffs' premises, or of a less height.

The remaining question is whether the instruction requested by the plaintiffs was sufficient to call for an instruction as to the rule of responsibility by which the defendants were bound. We think that, though not expressed with entire precision, it was. The plaintiffs were not entitled to have the instruction given as requested, but they were entitled to have the rule of law stated by which the liability of the defendants was to be determined. *Foss v. Richardson*, 15 Gray, 303. *Brightman v. Eddy*, 97 Mass. 478. *King v. Nichols*, 138 Mass. 18. For reasons already given, the instructions, in the opinion of a majority of the court, did not adequately express the duty and obligation which rested upon the defendants. *Exceptions sustained.*

BRIDGET M. BRICK vs. GEORGE L. BOSWORTH.

Hampden. September 25, 1894. — November 27, 1894.

Present: ALLEN, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Loss of Life — Employers' Liability Act — Notice of "Cause" — Exceptions — Due Care.

If a bill of exceptions states that certain requests for rulings were presented to the judge, who declined to give them, and that the exceptions allowed are to "this refusal to rule as requested and the rulings of the court as made," and contains the judge's charge reported in full, the exception to "the rulings of the court as made" may be treated, not as an exception to the charge as a whole,

but as saving exceptions to those rulings which were at variance with the rulings requested, and to which the attention of the judge was specially directed by the requests.

A notice to an employer that, at a time and place named, his servant was instantly killed by "the falling of a derrick upon him on account of the same being improperly or insecurely fastened," sufficiently states the cause of the injury to permit a recovery under St. 1887, c. 270, § 1, cl. 1 or 2.

A bill of exceptions stated that "during the delivery of the charge the plaintiff's counsel prepared the following requests for rulings, which he believed were proper because of the matter in the charge and the omissions therein, and at the close of the charge requested the court to give them," which the court declined to do. *Held*, that the questions raised by the requests were important and leading points in the case, on which counsel might assume that proper instructions would be given without requests therefor, and that he was not cut off from the presentation of them by the rule that requires requests for instructions on hypothetical statements of fact to be made before the arguments.

At the trial of an action under the employers' liability act, St. 1887, c. 270, §§ 1, 2, for the death of the plaintiff's husband while in the defendant's employ, caused by the fall upon him of a derrick, which was alleged to have been in a defective condition and negligently managed by the defendant's superintendent, the plaintiff is entitled to have the jury instructed that "the same care that people of ordinary prudence would exercise under the same circumstances" was all that was required of the deceased.

TORT, under the employers' liability act, St. 1887, c. 270, §§ 1, 2, by the widow of Jeremiah J. Brick, for causing his death. The declaration contained two counts, the first of which alleged that Brick was in the employ of the defendant, who used a derrick in connection with his work; that, while Brick was in the exercise of due care, the derrick fell upon him and instantly killed him, or he died without conscious suffering; and that the derrick was in a defective and unsafe condition, owing to the negligence of the defendant or of some one in his service and intrusted by him with the duty of seeing that the derrick was in proper condition. The second count alleged that Brick was working under one Phillips, who was employed by the defendant as a foreman, and was intrusted with and exercised superintendence over the work, or whose sole or principal duty was that of superintendence; and that, by reason of the negligence of Phillips in superintending the work, on November 8, 1892, the accident occurred. At the trial in the Superior Court, before *Fessenden, J.*, the jury returned a verdict for the defendant; and the plaintiff alleged exceptions, which appear in the opinion.

T. B. O'Donnell, for the plaintiff.

W. H. Brooks, for the defendant.

KNOWLTON, J. It does not appear in this case that any requests for instructions to the jury were made by either party before the judge's charge. The bill of exceptions states that "during the delivery of the charge the plaintiff's counsel prepared the following requests for rulings, which he believed were proper because of the matter in the charge and the omissions therein, and at the close of the charge requested the court to give them. . . . First, that the notice was sufficient as matter of law. Second, if the superintendent was negligent in any orders he gave in relation to the putting in of the post or the moving of the derrick under the second count, and which negligence caused the accident, the plaintiff is entitled to recover on this part of the case. Third, if the plaintiff's deceased exercised the same care that people of ordinary prudence would exercise under the same circumstances, the plaintiff may recover. Fourth, even if the deceased assisted in placing the post, under the direction of Mr. Phillips, and did not understand and appreciate the danger of the risk, the plaintiff is entitled to recover on this branch of the case." The court declined to give any of them. The exceptions allowed are to "this refusal to rule as requested and the rulings of the court as made," and to "the ruling and instruction in regard to the assumption of the risks of the business by the plaintiff's deceased." The bill of exceptions contains all of the evidence, and the judge's charge reported in full. If the exception to "the rulings of the court as made" is to be treated as an exception to the charge as a whole, it cannot avail the plaintiff for the correction of specific errors which were not pointed out, unless it appears that there was some substantial error which misled the jury and resulted in a mistrial. *Curry v. Porter*, 125 Mass. 94. *Rock v. Indian Orchard Mills*, 142 Mass. 522. But it may be fairly treated as saving to the plaintiff exceptions to those rulings which were at variance with the rulings requested, and to which the attention of the judge was specially directed by the requests.

The judge submitted to the jury the question of the sufficiency of the notice in regard to its statement of the cause of the injury, and in closing this part of the charge used these words: "If you are satisfied under this evidence, by a fair preponderance, that the defendant was not misled, then the notice is sufficient; if

you are not so satisfied, then your verdict should be for the defendant." The notice was treated as if it required the aid of a finding of fact under St. 1887, c. 270, § 3. No testimony was introduced for the purpose of showing that the defendant was not misled, and the jury were not instructed in regard to the kind of proof that might be resorted to for maintenance of this proposition, and there is nothing to indicate that the subject had been discussed in their hearing. The judge had previously said in his charge to the jury, "The only question is whether this notice is a sufficient one in one of its aspects under the statute." He treated it as sufficient in regard to the time and place, and we infer that he deemed it inaccurate by reason of its failure to designate the kind of negligence which caused the accident, so as to show the defendant upon which of the first two clauses of the statute of 1887, c. 270, § 1, the plaintiff relied. But the notice was not inaccurate in this particular.* It was sufficiently full and specific to entitle the plaintiff to recover under either clause of the statute applicable to such negligence. *Lynch v. Allyn*, 160 Mass. 248. *Donahoe v. Old Colony Railroad*, 153 Mass. 356. *Whitman v. Groveland*, 131 Mass. 553, 555. The jury should have been instructed in accordance with the plaintiff's request, "that the notice was sufficient as matter of law."

It is contended that the request came too late, and that the plaintiff cannot now avail herself of it. It is true that, in order to be entitled as a matter of right to have instructions given upon a hypothetical state of facts which may be found from the evidence, a party must seasonably present a request in writing to the judge, and the ordinary rule of practice which has been

* The notice, which was dated December 7, 1892, addressed to the defendant, and signed by the plaintiff, was as follows:

"You are hereby notified that on the eighth day of November, 1892, my husband Jeremiah J. Brick, while in your employ, was instantly killed or died without conscious suffering. The place where my said husband was instantly killed or died without conscious suffering was between Cabot Street and the railroad of the Connecticut River Railroad Company, near the Connecticut River in said Holyoke, and at the place where a new mill was being erected, supposed to belong to the Riverside Paper Company of said Holyoke. The cause of the death of my said husband was the falling of a derrick upon him on account of the same being improperly or insecurely fastened."

approved by this court is that such a request must be made before the arguments. But a party may well assume that, without special requests therefor, the judge will properly instruct the jury on the leading points of the case, and if at the close of the charge he observes that the judge has omitted to refer to important matters which ought to be explained to the jury, or thinks he has instructed erroneously in regard to them, he may bring the omissions or errors to the attention of the court, and ask for proper instructions. This practice saves the judge from the necessity of dealing with elaborate, complicated prayers for rulings without an opportunity for reflection, and at the same time saves the parties their right to exceptions if the judge neglects and refuses to instruct upon the important questions in the case. Pub. Sts. c. 153, § 8. Rule 50 of the Superior Court. *Ela v. Cockshott*, 119 Mass. 416. *McMahon v. O'Connor*, 137 Mass. 216.

The requests in the present case were prepared "during the delivery of the charge," apparently somewhat hastily, and they should not be construed too strictly against the plaintiff. The first request to which we have referred is perfect in form, and correct as a proposition of law. The third request, which ends with the words "the plaintiff may recover," calls for a definition of "due care" as applied to the plaintiff's conduct, and the quoted words must be interpreted as meaning "may recover if she proves the negligence alleged against the defendant." The presiding justice had instructed the jury at considerable length on the subject of the plaintiff's care, which was an important part of the case, and he used the words "due care" many times, but he gave the jury no standard by which to determine what "due care" was. The only explanatory phrase was the expression "proper care," which occurs once in this part of the charge. We think the plaintiff was entitled to have the jury told, on her request, that "the same care that people of ordinary prudence would exercise under the same circumstances" was all that was required of the plaintiff's husband.

Without considering questions raised upon other parts of the charge, we are of the opinion that, for these reasons, the entry must be,

Exceptions sustained.

PHILOMENE LAMAGDELAINE vs. JOSEPH TREMBLAY, JR.

Hampden. September 26, 1894. — November 27, 1894.

Present: ALLEN, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Poor Debtor — Charges of Fraud — Motion in Arrest of Judgment — Motion to dismiss — Qualification of Magistrate — Exceptions — Evidence.

Whether charges of fraud filed by a judgment creditor, under Pub. Sts. c. 162, § 17, against his debtor, upon the latter's application to take the oath for the relief of poor debtors, are sufficiently formal and precise, cannot, under c. 214, § 27, be brought to this court by a motion in arrest of judgment after a verdict of guilty of the charges.

A motion to dismiss an action, in which charges of fraud were filed by a judgment creditor, under Pub. Sts. c. 162, § 17, against his debtor, upon the latter's application to take the oath for the relief of poor debtors, because of defects in the charges, was made at a certain sitting of the court, and related to the charges as they then stood. Amended charges and specifications properly sworn to, and the sufficiency of which was not questioned by the motion to dismiss, were made several months later, and the trial at which the debtor was convicted and sentenced was upon the amended charges and specifications. *Held*, that the motion to dismiss was rightly overruled; and that the question of the sufficiency of the amended charges and specifications was not strictly brought before this court by an appeal from the order overruling the motion.

If one of several charges of fraud filed by a judgment creditor, under Pub. Sts. c. 162, § 17, against his debtor, upon the latter's application to take the oath for the relief of poor debtors, is well pleaded, a motion to dismiss the action because of defects in the charges cannot be sustained.

A person in the employ of the attorney of record of a judgment creditor, who files charges of fraud, under Pub. Sts. c. 162, § 17, against his debtor, upon the latter's application to take the oath for the relief of poor debtors, is not disqualified by interest to act as a magistrate in taking the creditor's oath to the charges.

An exception, taken at the trial of charges of fraud filed by a judgment creditor, under Pub. Sts. c. 162, § 17, against his debtor, upon the latter's application to take the oath for the relief of poor debtors, to the admission of evidence which related solely to a charge of which the debtor was found not guilty, becomes immaterial.

Evidence of good reputation is not competent to show that one is not guilty of a dishonorable or unlawful act which is not punishable as a crime.

CHARGES OF FRAUD, filed by a judgment creditor, under Pub. Sts. c. 162, against his debtor, upon the latter's application to take the oath for the relief of poor debtors. The charges, which were four in number, were those specified in the second, third, fourth, and fifth clauses of § 17. The Police Court of

Holyoke found the debtor guilty of the fourth charge, which was that he contracted the debt with an intention not to pay the same, and sentenced him accordingly. From this judgment and sentence the debtor appealed to the Superior Court. At the trial in that court, before *Maynard, J.*, the jury returned a verdict of guilty of the first and third charges, and not guilty of the fourth charge, the second charge having been stricken out; and the debtor alleged exceptions. He also filed motions to dismiss the action and in arrest of judgment, both of which were overruled; and he appealed to this court. The questions raised by the appeals and by the exceptions sufficiently appear in the opinion.

M. F. Druce, for the debtor.

W. Hamilton, (*W. H. Brooks* with him,) for the creditor.

BARKER, J. 1. The debtor's motion in arrest of judgment was rightly overruled, because it was for causes existing before the verdict, and which did not affect the jurisdiction of the court. *Chamberlain v. Hoogs*, 1 Gray, 172, relied upon by the debtor to show that Pub. Sts. c. 167, § 82, do not apply to actions like the present, was decided in the year 1854; but by St. 1864, c. 250, § 3, the provisions of which are continued in force by Pub. Sts. c. 214, § 27, the same restriction was extended to motions in arrest of judgment rendered in prosecutions for crime. Whether charges of fraud, in actions like the present, are sufficiently formal and precise, cannot now be brought to this court by a motion in arrest of judgment.

2. The debtor takes nothing by his appeal from the order overruling his motion to dismiss the action. That motion was filed at the October sitting in the year 1893, and related to the charges as they then stood. But amended charges and specifications properly sworn to, and the sufficiency of which was not questioned by his motion to dismiss the action, were made in the following May, and the trial at which he was convicted and sentenced was upon the amended charges and specifications. The motion to dismiss the action because of defects in the original charges was therefore rightly overruled, and the question of the sufficiency of the amended charges and specifications is not strictly brought before us by the appeal.

3. But besides this the motion to dismiss must in any event

have been overruled, because the fourth charge, that the debtor contracted the debt with an intention not to pay the same, was well pleaded, and that being so the action could not be dismissed upon the motion.

4. The first exception stated in the bill is to the ruling that the magistrate before whom the charges of fraud on which the debtor was tried in the police court were sworn to was not precluded from acting as a magistrate. It appeared that he was a person in the employment of the attorney of record of the creditor. But the administration of the oath was a purely ministerial function, involving no judicial action, and the interest of the magistrate did not disqualify him.

5. The second, third, fourth, fifth, and sixth exceptions stated in the bill were to the admission of evidence which related solely to a charge of which the debtor was found not guilty, and are by that finding made immaterial.

6. The seventh exception was to the admission in evidence of three executions which had been issued on the judgment before the execution on which the debtor was arrested, and this exception was not argued, and we treat it as waived.

7. The remaining exception is to the exclusion of evidence offered by the debtor as to his reputation. If we assume in his favor, what is not stated in the bill of exceptions, that the evidence rejected would tend to prove that he was in good repute for veracity and fair dealing and general character, still the charges upon which he was convicted were not of acts punishable as crimes, and it has been recently held by this court, that on principle as well as authority evidence of good reputation is not competent to show that one is not guilty of a dishonorable or unlawful act which is not punishable as a crime. *Howland v. Blake Manuf. Co.* 156 Mass. 543, 569.

Order overruling motion to dismiss affirmed.

Order overruling motion in arrest of judgment affirmed.

Exceptions overruled.

CARLO R. BEMIS vs. JOSEPH W. TEMPLE.

Worcester. October 3, 1894. — November 27, 1894.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Evidence — Collateral Issue.

The mere fact that, at the trial of an action, a collateral issue may be raised, is not of itself enough to justify the exclusion of evidence which bears upon the issue on trial.

In an action for injuries occasioned by the plaintiff's horse becoming frightened at a flag suspended across a street in a town, and for the suspension of which the defendant is responsible, evidence is admissible to show that ordinarily safe and gentle horses have been frightened at the flag on other occasions.

TORT, for injuries occasioned to the plaintiff's person and property by reason of his horse becoming frightened at a flag suspended across a street in Spencer.

At the trial in the Superior Court, before *Aldrich, J.*, the plaintiff introduced evidence tending to show that the defendant, as one of a political committee, caused a campaign flag to be suspended and maintained across Main Street in Spencer; that the flag was raised in July, 1892, and continued to swing until after the Presidential election of the same year; that it was suspended by a wire attached to buildings on opposite sides of the street; that it was about thirty-one feet in length and eighteen feet in width, and its lower edge, as suspended and when at rest, was about twelve feet above the central part of the travelled way; that on August 5, 1892, the plaintiff was driving from Maple Street in Spencer on to Main Street, and his horse, though a large and spirited animal, was safe and gentle in driving; that just as he was turning from Maple Street into Main Street, and coming in sight of the flag, and about thirty or forty feet distant from it, his horse became frightened at the flag, which was being floated gently by the breeze, and turned suddenly and ran a short distance, wrecking the plaintiff's carriage and harness, and injuring his person.

The plaintiff called as a witness one Hamilton, who testified that he was a teamster residing in Spencer; and that during the summer and fall of 1892 he drove frequently through that

portion of Main Street over which the flag was suspended, sometimes as often as five or six times daily.

The plaintiff then asked him the following question: "Have you ever observed other horses than the plaintiff's, which were reasonably safe and gentle for driving, to be frightened at this flag when it was being swayed gently by the breeze, and not being blown violently?" The defendant objected to this question; the judge excluded it; and the plaintiff excepted.

Evidence was introduced by the defendant, tending to contradict all that of the plaintiff, except that it was conceded that the defendant was responsible for the flag being suspended as it was.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

A. P. Rugg, (*J. R. Thayer* with him,) for the plaintiff.

F. B. Smith, for the defendant.

KNOWLTON, J. To maintain his case the plaintiff was obliged to show that the flag hung across the street was an object which was so likely to frighten horses as to render driving upon the street unsafe, and that in its position there it was a public nuisance. The fundamental question in the case was whether ordinarily safe and gentle horses would be frightened by it. The inquiry was in regard to the effect of an inanimate object upon an animal acting from instinct. The only way in which knowledge on this subject could ever be acquired is by observation of the effect of the object, or of similar objects, upon the animal. Inasmuch as no two flags hung in different places with different surroundings could ever present precisely the same appearance in different aspects to an unreasoning animal, the most satisfactory way of ascertaining the fact would be by observing the effect of this particular flag upon different horses. In all the observations and experiments, one factor in the problem, the swinging flag, would always be the same. The other factor, the horse, would always truly exhibit his real feelings, and the only possible difference in the results of different observations would arise from the difference in the horses. The question of fact whether a particular horse comes within the class of ordinarily safe and gentle horses is not difficult or complicated, and witnesses could easily give the results of their

observations of the conduct of horses which they considered ordinarily safe and gentle. We are of opinion that the best way to decide the main question in dispute is to show whether ordinary horses have manifested fear of the flag as it hung over the street. The question is not whether the results of experiments with other ordinary horses might be introduced upon the question whether the flag frightened the plaintiff's horse, although there is much authority for holding that, where the elements entering into the experiments are so nearly the same, the results may be shown to establish a fact of this kind; but the question is how a certain kind of animal is commonly affected by the sight of a particular object. To ascertain the truth, the jury must either use such knowledge as they happen to have on the subject without the aid of testimony, or experts must be called to give their opinions if the subject is one in regard to which experts can be found, or witnesses must be permitted to state particular facts which they have observed, each one of which is an illustration and example of the general fact in dispute. The only objection to testimony of the last kind in such a case is that in testing it collateral issues may be raised. Such an objection in many cases is a sufficient reason for excluding the testimony. Whenever a line of inquiry will give rise to collateral issues of such number or difficulty that they will be likely to confuse and distract the jury, and unreasonably protract the trial, it should not be permitted. But the mere fact that a collateral issue may be raised is not of itself enough to justify the exclusion of evidence which bears upon the issue on trial. Most circumstantial evidence introduces collateral issues, and ordinarily it is a practical question, depending upon its relation to the other facts and circumstances in the case, whether it should be received. It may be remote from the real issue, or closely connected with it, and in many cases its competency depends upon the decision of questions of fact affecting the practical administration of justice in the particular case such that a court of law will refuse to revise the ruling of the presiding judge, but will treat his ruling as a matter of discretion.

In the present case the only collateral inquiry which could arise is whether a horse called by a witness an ordinarily safe and gentle horse comes within that class. Such an inquiry is

certainly simple. We think there would be no practical difficulty in receiving and weighing testimony in regard to the conduct of horses which seem to be like ordinary horses in common use.

This precise question has been decided in favor of the plaintiff's contention by many courts of the highest respectability, and we have been referred to no decisions to the contrary. In *Brown v. Eastern & Midlands Railway*, 22 Q. B. D. 391, 393, which was an action for an injury caused by the shying of the plaintiff's horse at a heap of dirt, the Court of Queen's Bench held that the plaintiff was rightly permitted to show that various other horses had previously shied at the same place, and all the judges of the Court of Appeal "were clearly of opinion that the evidence was admissible, and affirmed the decision of the Queen's Bench Division." *Crocker v. McGregor*, 76 Maine, 282, is to the same effect. *House v. Metcalf*, 27 Conn. 631, was a suit for maintaining a wheel which frightened the plaintiff's horse. The court says the plaintiff "had a right, not only to show the facts regarding its size, form, location, exposure to view, and mode of operation, from which the jury might infer what effects it would naturally, necessarily, or probably produce, but also to prove what effects it had produced in fact. . . . The inquiry in every such case is, not whether the evidence offered is sufficient to prove the fact claimed, but whether it tends to prove it." In *Darling v. Westmoreland*, 52 N. H. 401, a suit for damages caused by the fright of a horse at a pile of lumber, evidence was received that other horses had been frightened by the same pile. The justices of the Supreme Court of New York who sat in *Champlin v. Penn Yan*, 34 Hun, 33, 37, unanimously sustained the admission of evidence "that on another occasion, prior to this accident, a flag similar to this in appearance, suspended over the same street and in a similar manner, did frighten other horses when driven along the street under the same." The Court of Appeals of New York takes a similar view of the law. *Quinlan v. Utica*, 11 Hun, 217; *S. C.* 74 N. Y. 603. *Wooley v. Grand Street & Newtown Railroad*, 83 N. Y. 121.

The defendant relies upon a line of cases in this Commonwealth, brought against cities or towns to recover for accidents

received while travelling on highways, in which it has been held that a plaintiff cannot introduce evidence of other similar accidents occurring at the place where he was hurt for the purpose of proving that the way was defective. *Collins v. Dorchester*, 6 Cush. 896. *Hall v. Lowell*, 10 Cush. 280. *Aldrich v. Pelham*, 1 Gray, 510. *Kidder v. Dunstable*, 11 Gray, 342. *Hinckley v. Barnstable*, 109 Mass. 126. *Schoonmaker v. Wilbraham*, 110 Mass. 184. *Merrill v. Bradford*, 110 Mass. 505. The ground on which these cases were decided is, that such collateral inquiries would be opened before the evidence could be properly received as would multiply issues for the trial of which the parties had had no opportunity to prepare, and would lead away from the main issue and tend to confuse the jury. In most of these cases the facts and circumstances of other accidents were so diverse and complicated that the decisions rest on grounds which are generally deemed satisfactory. In others, if they were to be considered apart from authority, it may be that an effect of an attempt to pass on another occasion was so closely connected with the alleged defect, and so free from other possible contributing causes, that, as a simple experiment, it might well have been proved. Such evidence has sometimes been received in other jurisdictions. *District of Columbia v. Armes*, 107 U. S. 519, 524. *Morse v. Richmond*, 41 Vt. 435. *Darling v. Westmoreland*, 52 N. H. 401. *Calkins v. Hartford*, 33 Conn. 57. *Quinlan v. Utica*, 11 Hun, 217; *S. C.* 74 N. Y. 608. *Delphi v. Lowery*, 74 Ind. 520. *Chicago v. Powers*, 42 Ill. 169. *Moore v. Burlington*, 49 Iowa, 136. *Augusta v. Hafers*, 61 Ga. 48. In this case we have no occasion to consider whether the strict construction put by this court in former years upon the statute giving damages for accidents caused by defects in highways, and the disinclination to look with favor upon claims brought under it, have led in some such cases to too great an extension of the rule excluding testimony involving collateral inquiries. This is not an action against a city or town. It presents a simple question in the law of evidence. It should be decided in accordance with sound principles, and this court has established precedents in favor of the plaintiff's contention that accord with those which we have already cited from other courts. In *Reeve v. Dennett*, 145 Mass. 23, upon the

question of the effect of the use of a certain medicine in dentistry, evidence was received that dental operations performed by a certain dentist who used the medicine were less painful than those performed by other dentists who did not use it. In *Brierly v. Davol Mills*, 128 Mass. 291, to prove that an attachment would be effective on a certain loom, it was held competent to show that it worked successfully on another loom of similar construction. See also *Gahagan v. Boston & Lowell Railroad*, 1 Allen, 187; *Hunt v. Lowell Gas Light Co.* 8 Allen, 169; *Commonwealth v. Goodman*, 97 Mass. 117, 119; *Fay v. Whitman*, 100 Mass. 76; *Hodgkins v. Chappell*, 128 Mass. 197; *Baxter v. Doe*, 142 Mass. 558; *Commonwealth v. Leach*, 156 Mass. 99; *Shea v. Glendale Elastic Fabrics Co.*, *post*, 463.

A majority of the court are of opinion that the evidence offered should have been admitted. *Exceptions sustained.*

WILLIAM BECKMAN vs. MARY J. DAVIDSON.

Plymouth. October 16, 1894. — November 27, 1894.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

Writ of Entry — Boundary — Disseisin — Adverse Possession.

At the trial of a writ of entry, brought in 1893, the tenant traced his title back to a deed to B. dated in 1831, giving the northern boundary of the land conveyed as A.'s land, and providing that B., his heirs and assigns, were "to support all the fence around said land"; and the deed under which the demandant claimed described his land as beginning "at the southerly corner of B.'s land" on the road, and made B.'s land his northerly boundary. There was evidence tending to show that the fence between the respective lots of the parties, which were adjacent to each other on the same street, stood where a very ancient fence stood; and the judge, who heard the case without a jury, found that from 1854 to the time of the trial a fence had been maintained in the line of the present fence, and that during that period the several owners of the B. lot had "openly and continuously held possession under a claim of right, and adversely, of the land northerly of and up to the line of said fence, including the demanded premises." The tenant became the owner also of the land formerly owned by A.; and a survey showed that the measurements on the road and in the rear given in the deed to B., added to the measurements on the road and in the rear given in the deed of A.'s land referred to in the description of the B. lot, were together about six feet less than the actual measurements of the lines of these two lots as occupied by the tenant. The evidence tended to show that this land was

formerly of little value, rough, uneven, covered in part with bushes and difficult of measurement. *Held*, that the judge properly found that the fence was the line of ownership between the parties; and that judgment was rightly ordered for the tenant.

If an ancient deed of land provides that the grantee is "to support all the fence around said land," and a fence is erected by agreement of the parties in occupation of that and the adjoining land at or about that time, as and for a monument contemplated by the deed, and is so erected without fraud or mistake, and afterwards acted upon by them, a slight variation from mathematical accuracy in fixing its position will not affect its conclusiveness as a boundary.

If the grantee in a deed of land, providing that he is "to support all the fence around said land," and his successors in title for more than twenty years occupy continuously up to a fence which was on the land at the date of the deed, or was erected there about that time, as a boundary of the lot described in the deed, but which is found by a survey to have been placed six feet beyond the line of such land, the seisin of such grantee will pass by his conveyance of the land, even though the language of the description is the same as that in the deed to him; and a subsequent grantee is entitled to invoke the continuous possession of his predecessors in title to establish a title to the strip of six feet by disseisin and adverse possession.

WRIT OF ENTRY, dated October 25, 1893, to recover a parcel of land in Plymouth. Plea, *nul disseisin*. Trial in the Superior Court, without a jury, before *Bishop, J.*, who found for the tenant; and the demandant alleged exceptions. The facts appear in the opinion.

C. G. Davis, for the demandant.

D. E. Damon, for the tenant.

KNOWLTON, J. The question in dispute in this case is where is the boundary line between the two lots owned by the demandant and the tenant respectively, which are adjacent to each other on the easterly side of the same street. The tenant traces her title back to a deed to Jane Burgess, dated June 25, 1831, conveying "a certain house lot in Plymouth aforesaid, at Hobb's Hole, so called, bounded as follows: beginning at the westerly corner by road, thence north forty-two degrees east one hundred and forty-six feet by Joseph Whiting's land to his corner, bounded thence south thirty-seven degrees east sixty-eight feet, thence south forty-two degrees west to the road, thence by road to the bounds first mentioned, with all the privileges to the same belonging, said Jane Burgess, her heirs and assigns, to support all the fence around said land." The demandant's land is the next southerly of this, and the deeds under which he claims describe his land as beginning "at the southerly corner

of Jane Burgess's land" on the road, and make Jane Burgess's land his northerly boundary. The tenant contends that the boundary line is a fence now standing on the land, and the demandant contends that his lot extends about six feet beyond the line of the fence. There was evidence tending to show that this fence stands where a very ancient fence stood, and the judge who heard the case without a jury found "that from the year 1854 to the present time a fence has been maintained in the line of the fence relied upon by the tenant, and that the several owners of the Jane Burgess lot have openly and continuously held possession under a claim of right, and adversely, of the land northerly of and up to the line of said fence, including the demanded premises, during said period to the present time." A survey shows that the measurements on the road and in the rear given in the deed to Jane Burgess, added to the measurements on the road and in the rear given in the deed of Joseph Whiting's land, referred to in the description of the Burgess lot, are together about six feet less than the actual measurements of the lines of these two lots as they are now occupied by the tenant, who has become the owner of both of them. The demandant therefore contends that the true southerly line of the tenant's lot is about six feet northerly of the fence.

In the first place the evidence tends to show that this land was formerly of little value, rough, uneven, covered in part with bushes, and difficult of measurement. Under these circumstances it is not improbable that the monuments which marked the southerly line of the Whiting lot were set a little farther south than an accurate measurement would have placed them, thus giving a different starting point for the line of the Burgess lot from that contended for by the demandant. But in the absence of evidence on this point the judge properly found that the boundary was as fixed by the exact measurement. Very likely the measurement by which the monuments of the Burgess lot were originally fixed was favorable to the grantee, and it is not strange that the lines of the two lots together should exceed by six feet the distance called for by the ancient deeds. The deed to Burgess refers to no monument in terms on the southerly side, but provides that the grantee is "to support all the fence around said land." This is equivalent to a statement, either that there was then a fence around the land which, as a monu-

ment, would mark its boundaries, or that a fence was to be erected on the line, which would then become a monument. The evidence in regard to the ancient fence and the conduct of the parties in occupation was sufficient to warrant a finding that this fence was erected by agreement of the parties, at or about that time, as and for a monument contemplated by the deed, and if it was so erected without fraud or mistake, and afterward acted upon by them, a slight variation from mathematical accuracy in fixing its position would not affect its conclusiveness as a boundary. *Owen v. Bartholomew*, 9 Pick. 520. *Blaney v. Rice*, 20 Pick. 62. *Kellogg v. Smith*, 7 Cush. 875. *Stevenson v. Erskine*, 99 Mass. 367. *Hathaway v. Evans*, 108 Mass. 267. *Coyle v. Cleary*, 116 Mass. 208. *Miles v. Barrows*, 122 Mass. 579. *Lovejoy v. Lovett*, 124 Mass. 270. *Dodd v. Witt*, 139 Mass. 63. *Hooten v. Comerford*, 152 Mass. 591.

So too the evidence well warranted a finding for the tenant on the distinct ground that she had acquired a title by disseisin and adverse possession for a period of more than twenty years. Assuming, as we must do, that Jane Burgess and her successors in the title occupied continuously up to the fence as a boundary of the lot described in her deed, her seisin would pass by her conveyance of the lot, even though the language of the description was the same as that in the deed to her, and it passed through mesne conveyances to the tenant, who thus is enabled to invoke the continuous possession of her predecessor in title. There was evidence to warrant all the findings of fact, and under those findings the rulings requested were rightly refused.*

Exceptions overruled.

* In addition to the finding recited in the opinion, the judge found the following facts:

"From the year 1854, during the life of Jane Burgess and the life of her daughter Ruth Burgess, who took by inheritance from her, until the foreclosure of mortgage by Solomon J. Gordon, [the sole heir at law of Timothy Gordon, to whom, on May 1, 1861, Jane Burgess mortgaged the premises in question,] a period of more than twenty years, said Jane Burgess and Ruth Burgess held open, adverse, and continuous possession under a claim of right of the demanded premises up to the division line of fence claimed by the tenant.

"The demandant's premises, according to the description in the deed to him and the deeds under which he claims, as properly located by survey, do not extend northerly beyond the line of said fence.

"The northwesterly line of the Jane Burgess lot is a line thirty feet from

ABIEL P. R. GILMORE vs. GEORGE F. WILLIAMS.

Bristol. October 22, 1894. — November 27, 1894.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

Breach of Warranty — Action — Bar — Judgment and Payment in former Action — Pleading.

A judgment by agreement, without a trial, in an action by A. against B. upon a promissory note given in payment for property bought by B. of A., the answer in which alleged that, if B. signed the note, it was obtained by fraud and misrepresentation and without any consideration therefor, and a voluntary payment of the judgment, are not a bar to an action by B. against A. for the breach of a warranty in regard to the condition and quality of the property, although he knew of the breach of the warranty long before he paid the judgment; and the fact that the note contained a stipulation that the title to the property should not pass until the note was fully paid is immaterial in the second action.

KNOWLTON, J. This is an action to recover damages for a breach of a warranty in regard to the condition and qualities of three cows, bought by the plaintiff of the defendant on February 13, 1891. At the time of the purchase the plaintiff paid one hundred dollars in cash, and gave his note for one hundred and twenty-five dollars, payable in two equal annual instalments, with interest, which made up the agreed price, two hundred and twenty-five dollars. At the time of the trial there was

and running parallel to Jeannette Manter's land," which land, by the deed to the tenant, was made her northerly boundary.

The rulings requested by the demandant, which were refused as not applicable to the facts found by the judge, were as follows:

"The grantee under the deeds from Jane Burgess or her assigns can sustain no claim of title beyond the limits of the estate granted.

"No land can be granted as appurtenant to land granted.

"If said Jane Burgess or assigns ever acquired by prescription any land southerly of the estate conveyed by her or them under the Gordon mortgage, they have still the title, unless by other instruments it has been conveyed to the demandant.

"The deeds from Jane Burgess or the persons who became grantors under her, made within twenty years previous to the commencement of this suit, are conclusive as matter of law to show that no title was claimed by the grantors of her land to the tenant or his grantors in the land in controversy.

"The tenant is estopped from title to the same."

evidence tending to show the warranty alleged, and that the plaintiff was damaged by the breach of it. The defendant then offered evidence that in September, 1893, a suit was brought by the defendant against the plaintiff on the note, and that a judgment was subsequently rendered by agreement of parties, without a trial, for the full amount of the note, which was afterwards paid by the present plaintiff. After the payment of the judgment, this suit was commenced. The plaintiff knew of the breach of the warranty long before he paid the judgment. The court ruled that the judgment by agreement upon the note, without a trial, and the voluntary payment of it were a bar to this suit, and directed a verdict for the defendant.

When the plaintiff discovered the breach of warranty, he could avail himself of his rights in either of three ways. He might rescind the contract, return the property, and recover back his money; *Bryant v. Isburgh*, 13 Gray, 607; he might set up the breach of warranty as a defence in whole or in part to a claim upon the note, and have his damages allowed by way of recoupment; or he might pay the whole amount of the note and bring a suit for his damages. It is clear that he was not obliged to set up the breach of warranty in answer to the claim on the note, and that payment of the note is not in itself a bar to an action for the breach of the warranty. *Smith v. Palmer*, 6 Cush. 513. *Cook v. Castner*, 9 Cush. 266, 277. *Star Glass Co. v. Morey*, 108 Mass. 570, 573. *Hunt v. Brown*, 146 Mass. 253, 255. *Fiske v. Steele*, 152 Mass. 260. *Riley v. Hale*, 158 Mass. 240, 246. If he chose to plead the breach of warranty in answer to the claim on the note, and if a judgment was entered against him for the whole amount due on the note, or a part of it, on the issue thus raised, the judgment would be a bar to any further claim under the warranty. This would be so whether the judgment was entered by consent of parties, or upon a default after answer, or upon a verdict after trial on the facts. His election to claim his damages by way of recoupment in that suit would be conclusive on him. *Bradley v. Bradley*, 160 Mass. 258. *Watts v. Watts*, 160 Mass. 464.

If we interpret the bill of exceptions literally and strictly, there is nothing in it to show what defence was set up in the suit upon the note. The ruling was made without any express

reference to the question whether the breach of warranty was pleaded or not. If we do not go outside of what is expressly stated in the exceptions, we must hold that the ruling was erroneous, because it stated in general terms that a submission to a judgment upon the note and a payment of the judgment were a bar to this action.

But we think it probable that the ruling was made in reference to the evidence which was introduced, showing the pleadings in the former suit. The bill of exceptions states that a certified copy of these pleadings and of the subsequent proceedings in the case was introduced, without stating what the pleadings were, and without otherwise referring to the evidence or incorporating it into the bill of exceptions. With the manuscript copy of the record prepared for our use, we find a copy of the pleadings and other proceedings in the suit on the note, certified by the clerk to be correct. If we assume, as the defendant in his brief seems to assume, that this is to be treated as a part of the bill of exceptions, we must inquire whether the cause of action now relied upon was pleaded in defence to the claim on the note. We find in the answer of the defendant in the former case an allegation that, if he signed the note, it was obtained "by fraud and misrepresentation, and without any consideration therefor." This may be sufficient to bar his claim in the present action under the first count in his declaration, which is in tort for fraudulent representations; but the declaration contains also a count in contract for the same cause of action, the plaintiff alleging that he is doubtful to which class of actions his case belongs. This second count alleges that there was a contract of warranty that the cows were with calf by a certain bull mentioned, and that each would give a specified quantity of milk per day "when fresh with calf." The giving of such a warranty which afterwards proves to be false is not necessarily inconsistent with perfect honesty on the part of the defendant. He may have believed the statements which entered into his contract, although it turned out that he was mistaken. In that case the present plaintiff would fail to maintain his allegation of fraud in his answer to the suit on the note, although he would have had a good defence to the extent of his damages if he had pleaded a breach of warranty. It appears that his claim, as

stated in the second count of his declaration, is materially different from the matter set up in his answer in the former suit, and the judgment in favor of the plaintiff upon those pleadings is no bar to the present action.

The copy of the pleadings in the former suit shows that the note declared on contains the stipulation that the title to the cows should not pass until the note was fully paid, and this fact, which is not mentioned in the bill of exceptions, is relied on by the defendant in his brief. But we are of opinion that it is not material in the present action. We must assume, on the facts stated, that the contract was executed on both sides so far as it could be before the time when the first annual payment on the note would become due. The stipulation making the sale conditional upon the payment of the note was for the protection of the defendant by way of security. The plaintiff entered into possession under his contract, and he had a right to the fruits of it. He might retain the cows on payment of the note, and enforce his right to be paid as damages the difference between their value as they were and their value as they would have been if the warranty had been well founded.

Exceptions sustained.

E. L. Barney & D. T. Devoll, for the plaintiff.

C. S. Hayden, for the defendant.

AMELIA H. ANTHONY vs. MERCANTILE MUTUAL ACCIDENT ASSOCIATION.

Bristol. October 23, 1894. — November 27, 1894.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

Accident Insurance — Burden of Proof — Law and Fact.

In an action upon a policy of insurance against "bodily injuries effected through external, violent, and accidental means, within the intent and meaning of the conditions" recited therein, one of which is that no claim shall be valid thereunder "when the death or injury may have happened in consequence . . . of any voluntary exposure to unnecessary danger," and another of which is that "standing, riding, or being upon the platforms of moving railway coaches other

than street cars, or riding in any other place not provided for the transportation of passengers, or entering or attempting to enter or leave any public conveyance using steam as motive power while the same is in motion, . . . are hazards not contemplated or covered by this certificate," the burden of proof is on the defendant, after the plaintiff has shown that the injuries were "effected through external, violent, and accidental means," to show that they resulted from some of the causes specified in the conditions as not within the insurance.

A policy of insurance was issued against "bodily injuries effected through external, violent, and accidental means," containing conditions that no claim should be valid thereunder "when the death or injury may have happened in consequence . . . of any voluntary exposure to unnecessary danger," and that "standing, riding, or being upon the platforms of moving railway coaches other than street cars, or riding in any other place not provided for the transportation of passengers, or entering or attempting to enter or leave any public conveyance using steam as motive power while the same is in motion, . . . are hazards not contemplated or covered by this certificate." In an action upon the policy, it appeared that the assured was a passenger on a train upon a certain railroad; that he was seen in his usual health in one of the cars of the train late in the evening, just before it reached a station at which trains were accustomed to stop; that he had a ticket for a station farther on, to which the train was going; that the train stopped at the first named station to take the mail; that the night was dark, and there was no light on the platform at the station; that the train started slowly, and, when it had gone not more than thirty or fifty feet, he was discovered on the ground between the platform and the nearest rail of the track, with his legs crushed by the wheels of one of the trucks which had passed over them; that he survived about four hours, being unconscious most of the time, and then died from the injury; and that no witness saw the accident, and nothing more was shown in regard to the cause of it. *Held*, that it could not be ruled, as matter of law, that the burden of showing that the injuries to the assured resulted from some of the causes specified in the conditions of the policy as not within the insurance, was sustained by the defendant, but that it was a question for the jury.

CONTRACT, upon a policy of insurance against accident, issued by the defendant to William A. Anthony, and payable to the plaintiff, who was his widow. At the trial in the Superior Court, before *Braley*, J., the jury returned a verdict for the plaintiff; and the judge, at the request of the parties, reported the case for the determination of this court. If the case should have been submitted to the jury, judgment was to be entered on the verdict; otherwise, judgment was to be entered for the defendant. The facts appear in the opinion.

E. Avery & A. E. Avery, for the defendant.

A. N. Lincoln, for the plaintiff.

KNOWLTON, J. The plaintiff claims under a policy of insurance, whereby the defendant promised to pay her five thousand dollars on proof of the death of her husband, William

A. Anthony, from "bodily injuries effected through external, violent, and accidental means, within the intent and meaning of the conditions" recited therein. The testimony in regard to the material facts was uncontradicted. William A. Anthony was a passenger on a train on the Colorado and Midland Railroad. He was seen in his usual health in one of the cars of the train late in the evening of September 3, 1891, just before it reached Granite, Colorado, which was a station at which trains were accustomed to stop. He had a ticket for Denver, a place to which the train was going. The train stopped at Granite to take the mail. The night was dark, and there was no light on the platform at the station. The train started slowly, and when it had gone not more than thirty to fifty feet he was discovered on the ground between the platform and the nearest rail of the track, with his legs crushed by the wheels of one of the trucks which had passed over them. He survived about four hours, being unconscious most of the time, and then died from the injury. No witness saw the accident, and nothing more was shown in regard to the cause of it.

The policy contains numerous conditions, which immediately follow the words "Provided always," among which are these: "No claim shall be valid under this certificate when the death or injury may have been caused by duelling, fighting, . . . or when the death or injury may have happened in consequence of war or invasion, or of riding or driving races, or of any voluntary exposure to unnecessary danger, hazard, or perilous adventure. . . . Standing, riding, or being upon the platforms of moving railway coaches other than street cars, or riding in any other place not provided for the transportation of passengers, or entering or attempting to enter or leave any public conveyance using steam as motive power while the same is in motion, . . . are hazards not contemplated or covered by this certificate," etc.

The only question reserved by the report is whether there was evidence to warrant the submission of the case to the jury. This question may be divided into two branches: first, whether the burden of proof is on the defendant, after the plaintiff has shown that the injuries were effected "through external, violent, and accidental means," to show that they resulted from some of the causes specified in the conditions as not within the

insurance, or on the plaintiff to show that they did not; secondly, if the burden of proof is on the defendant, ought the judge to have instructed the jury that the burden was sustained, and that their verdict must be for the defendant.

The question in regard to the burden of proof has been considered and practically decided in previous cases. *Freeman v. Travelers' Ins. Co.* 144 Mass. 572. *Coburn v. Travelers' Ins. Co.* 145 Mass. 226. *Badenfeld v. Massachusetts Accident Association*, 154 Mass. 77. The substance of the contract is to pay if death results from injuries effected through external, violent, and accidental means, with a proviso stating many exceptions, most of which depend upon the subsequent conduct of the insured. While the use of the words "within the intent and meaning of the conditions herein recited" may have been intended to have the same effect as if all the matters contained in the conditions had been written into the sentence descriptive of the risks, and as if the general description of the risks had been in affirmative words which would not include any of these excepted cases, and while there is logical force in the argument that the plaintiff should show affirmatively that his case comes within the terms of the policy by showing that the injury was not from any one of the excepted causes, we are of opinion that practically, and under the general rules of pleading, it is better to hold that the plaintiff is not bound to allege or prove that his is not one of the cases to which the insurance does not apply. These cases, in whatever language they may be stated, are in the nature of exceptions under an affirmation previously stated in general terms. In this respect there is no good ground of distinction between the present case and *Freeman v. Travelers' Ins. Co.* and *Coburn v. Travelers' Ins. Co.*, cited above.

There can hardly be any doubt that the death of the insured was the result of accident. The burden being on the defendant to prove that it was from one of the excepted causes, the question remains whether the jury should have been instructed, as matter of law, that the burden was sustained. It is not often, where a party has the burden of proving a fact by the testimony of witnesses, that the jury can be required by the court to say that the fact is proved. They may disbelieve the witnesses. If the conclusion is to be reached by drawing inferences of fact

from other facts agreed, ordinarily the jury alone can draw these inferences; it is only when no inferences are possible except those which lead to one conclusion that the jury can be required to find a proposition affirmatively established.

In the present case it cannot be said, as matter of law, that death was the result "of any voluntary exposure to unnecessary danger" within the meaning of these words as explained in *Keene v. New England Accident Association*, 161 Mass. 149. See also *Badenfeld v. Massachusetts Accident Association*, 154 Mass. 77. The circumstances point strongly to an inference that the deceased was "standing, riding, or being" on the platform of one of the cars, or entering or attempting to enter or leave a car while it was in motion. But we cannot say, as matter of law, that the jury were bound to draw this inference of fact. It is conceivable that, while walking on the unlighted platform as the car was about to start, he accidentally fell between the platform and the rail, or in some way was accidentally or intentionally pushed or thrown down. If the burden were on the plaintiff in this branch of the case, a verdict for the defendant might well be directed, but we are of opinion that the principal question before the court at the trial was one of fact, and not of law.

Judgment on the verdict.

JOSEPH H. BAKER & others vs. COMMERCIAL UNION
ASSURANCE COMPANY.

SAME vs. WESTCHESTER FIRE INSURANCE COMPANY.

Essex. November 7, 1894. — November 27, 1894.

Present: FIELD, C. J., ALLEN, KNOWLTON, & BARKER, JJ.

*Fire Insurance — Oral Contract to continue Policy in Force — Exceptions —
Variance — Action — Instructions — Principal and Agent — Non-payment
of Premium by Assured — Validity of Contract.*

In actions upon an alleged oral contract of insurance, it appeared that the plaintiff held a policy of insurance against loss by fire on his property in each of the defendant companies, which expired on a certain Sunday; that A., an insurance agent, was the plaintiff's agent in procuring all his insurance; that B. was the

defendants' local agent; and that C. was a clerk in the employ of A., who died before the trial. C. testified that on Saturday B. came into A.'s office and said, "How about those policies which will expire to-morrow of" the plaintiff? to which A. replied, "Hold them, I want to see" the plaintiff "before they are written up, I think there will be some change in the form"; that B. said, "All right"; that on the next Monday B. called in A.'s office and said, "How about those policies which I held over Sunday, the" plaintiff's "policies"? to which A. replied, "I have not seen" the plaintiff "yet, I would like to have you hold them until I can see him"; and that B. said that he would. B. testified that on Saturday A. asked him to hold the policies over Sunday until he could see the plaintiff; that on that day B. wrote in his "expiration" book, opposite the two policies, the word "Hold"; and that on Monday A. told him that he had not seen the plaintiff, and did not think he would want the policies, and told him, in so many words, not to renew the policies. Expert testimony was introduced which tended to show that the meaning of the term "Hold" was to keep the policy in force for a reasonable time under the circumstances of the case. Nothing further was said or done as to the renewal of the policies; and on the following Friday the property was destroyed by fire. *Held*, that there was evidence to warrant a verdict for the plaintiff.

If the declaration in an action contains four counts, and an exception is taken to the refusal of the judge to rule, as requested by the defendant, "that there was no evidence which would warrant the jury in finding a verdict for the plaintiff on the first, second, third, or fourth counts of the declaration, respectively," and the request, as applied to either count, embodies a correct proposition of law, and the defendant was prejudiced by the failure to give it in terms, the exception must be sustained.

A declaration, describing the contract relied on as an agreement to insure the plaintiff's property against loss by fire for one year from a certain day, which was the date of the expiration of a policy of insurance for one year thereon in the defendant company, is not sustained by proof of an arrangement between the respective agents of the parties, by which the defendant's agent agreed to hold the policy in force until the plaintiff's agent could see the plaintiff and ascertain on what terms he wished to take a new policy, and until one of the parties should terminate the arrangement, or until the arrangement should end by the expiration of a reasonable time.

If the agent of A. and the agent of an insurance company in which A. holds a policy of insurance against loss by fire on his property which is about to expire, enter into an arrangement by which the insurer's agent agrees to hold the policy in force until A.'s agent can see A. and ascertain on what terms he wishes to take a new policy, and until one of the parties shall terminate the arrangement, or until the arrangement shall end by the expiration of a reasonable time, and the property is destroyed by fire within five days, during which nothing further has been said or done as to the renewal of the policy, an action may be maintained by A. against the insurance company to recover for his loss.

The declaration in an action upon a contract of insurance contained five counts, the first and third of which alleged respectively that the defendant agreed to insure the plaintiff's property against loss by fire for one year from a day named, and to issue to the plaintiff, in due course, a policy of insurance in accordance with the contract; and that the defendant insured the plaintiff's property for one year from a day named. The other counts alleged respectively that the defendant agreed to insure the property from a day named until the

agreement should be superseded by another agreement, or until a policy should be issued; that the agreement for insurance should continue in force from a day named, until terminated by notice from one party to the other; and that the agreement should remain in force from a day named, for a reasonable time. At the trial, the only contract relied on was an oral one made by the respective agents of the parties. The defendant requested the judge to rule "that there was no evidence which would warrant the jury in finding a verdict for the plaintiff on the first, second, third, or fourth counts of the declaration, respectively." The judge refused so to rule, and gave full instructions to the jury in regard to the rights and powers of insurance agents to make oral contracts of insurance; and, while he did not in express words say that the jury could not find such a contract as was alleged in the first or third counts of the declaration, the whole tenor of his charge was such that the jury must have understood that they could not find any other valid contract than a temporary contract incidental to the issuing of a policy. *Held*, that the defendant was not injured by the refusal to give in terms the instructions requested.

The agent of an insurance company has authority to make an oral contract of insurance against loss by fire, which will bind the company until a policy can be issued.

An oral contract of insurance against loss by fire, made by the agent of an insurance company until a policy can be issued by the company, is valid when there is no payment or tender of payment of the premium, if the agent chooses to give the insured credit.

If the agent of A. and the agent of an insurance company in which A. holds a policy of insurance against loss by fire on his property, which is about to expire, enter into an arrangement by which the insurer's agent agrees to hold the policy in force temporarily for an indefinite period until there shall be some further communication between them in regard to the matter, it being understood that A.'s agent is to see A. in the mean time, the policy will remain in force, in the absence of any notice by either party to the other, even if the time that was reasonably necessary to enable A.'s agent to see him has elapsed.

TWO ACTIONS OF CONTRACT. The declaration was the same in each case, and, as amended, contained five counts. The first count alleged that on March 19, 1892, the defendant, by its agent, agreed with the plaintiffs to insure for a period of one year from March 20, 1892, certain property of the plaintiffs, upon the same terms and conditions as were contained in a policy of insurance in the sum of \$2,500, issued by the defendant against loss by fire on the same property, and which expired on that day, and to issue to the plaintiffs, in due course, a policy of insurance in accordance with said contract. The second count alleged that the defendant agreed with the plaintiffs to insure the property upon the same terms set forth in the expiring policy of insurance from March 20, 1892, until said agreement should be superseded by another agreement, or until a policy should be issued by the defendant to the plaintiffs. The third

count alleged that on March 20, 1892, the defendant insured the plaintiffs' property for the period of one year from that day. The fourth count alleged that on March 19, 1892, the defendant insured the plaintiffs' property, and it was agreed that said agreement should continue in force from March 20, 1892, until terminated by notice from one party to the other. The fifth count alleged that on March 19, 1892, the defendant insured the plaintiffs' property, and it was agreed that this contract should remain in force from March 20, 1892, for a reasonable time.

The cases were tried together in the Superior Court, before *Richardson, J.*, who allowed a bill of exceptions, in substance as follows.

The plaintiffs, who were copartners, were manufacturers of shoes, doing business in Springfield under the name of the Springfield Shoe Company. The business was conducted by the plaintiff Charles H. Baker, who lived in Springfield, the other plaintiffs living elsewhere. Charles H. Baker is the Baker referred to in the testimony.

There were no direct dealings between the plaintiffs and any officer of the defendant corporations, and the plaintiffs' claim was based upon the dealings between Fred. A. Judd, who, for all purposes material to these causes, was admitted by the defendants to be the plaintiffs' agent, and Thomas R. Weaver, a member of the firm of Ladd Brothers and Company, whose relation to the defendants hereinafter appears.

Judd and Ladd Brothers and Company were each insurance agents, and their respective offices were in the same building in Springfield. Judd had charge of writing or procuring all the plaintiffs' insurance. It had been the practice for several years between Judd and Ladd Brothers and Company, that, where either had insurance to be written which for any reason was not written by the companies represented by him or them, to cause it to be written by the other in companies represented by him or them. In such cases, it did not appear whether the premium was paid by the insured or by the agent procuring the insurance, or whether credit was given for the premium or it was paid in cash.

Judd had procured Ladd Brothers and Company to write two policies of insurance, in the Massachusetts standard form, on the

plaintiffs' stock, for the amount of \$2,500 each, one in each of the defendant companies. These policies expired on March 20, 1892, which was Sunday. Charles H. Baker testified that, at an interview with Judd three or four weeks before the expiration of these policies, he told Judd that he wished the policies renewed, but that perhaps he might wish the form changed so as to cover not only stock, but also machinery and fixtures, as did all his other policies. The defendants admitted that the plaintiffs had at the time of the fire more stock in their factory than the amount of their insurance upon stock; that they intended to renew the two expiring policies, and had done everything that could be expected of them in the way of instructing their agent, Judd, to renew the policies.

Judd died after the beginning of these actions, and before the trial, and the only witnesses who testified to the making of the alleged oral contract of insurance were Nelson R. Hosley, a man of seventeen years' experience in the insurance business, who was at the time, and had been since February, 1880, Judd's clerk, and Thomas R. Weaver, above referred to. Both were called as witnesses by the plaintiffs.

Hosley testified substantially as follows: "In the latter part of the day, on Saturday, March 19, as near as I can remember, Mr. Weaver called at the office and asked about the policies of Baker and Company, which were expiring the next day. Mr. Judd and I were both in the office at the time, and he (Weaver) stepped up and said, 'How about those policies which will expire to-morrow of J. H. Baker?' I stood at the desk facing the door and Mr. Judd stood at another desk with his back towards the door, and I spoke up and said, 'They want to be held,' or 'Hold them.' Mr. Judd turned round and says he, 'Yes, hold them, I want to see Mr. Baker before they are written up; I think there will be some change in the form, these policies covering all on stock and the balance of the policies covering on machinery, office furniture, and stock. I don't know but that they are to be written as the other policies were.' Mr. Weaver says, 'All right.' On the next Monday, about three o'clock in the afternoon, Weaver called in the office and says, 'How about those policies which I held over Sunday, the Baker policies?' Judd says, 'I have not seen Mr. Baker yet, I would like to have you

hold them until I can see him.' Mr. Weaver replied that he would."

On cross-examination, Hosley testified that he understood that the policies were held over Sunday; and that he would not swear whether, in the conversation on Monday, Weaver used the words "over Sunday" or not, but that he did not use them in the previous conversation on Saturday.

Weaver testified substantially as follows: "On Saturday, March 19, I went into Mr. Judd's office, carrying some other policies which I had renewed for him, and asked him, 'What about the Baker policies? you gave us the forms for Mr. Mackintosh, but you have not for Mr. Baker'; and he said that these policies were special policies that covered on stock, and he did n't think they would want to be renewed, but asked me to hold them over Sunday and he would see Mr. Baker and let me know. In the course of the conversation, Judd said he did n't know whether they wanted them or not. He asked me to hold them over Sunday till he could see Mr. Baker. I went back to my office and wrote in pencil on the expiration book, opposite the two policies which were to expire, the word 'Hold.' (The expiration book, which was in evidence, was a book kept by Ladd Brothers and Company, showing the date of the expiration of their policies.) I went to see Mr. Judd on Monday about one o'clock. That was the only time I saw him on that day. I had only one conversation with him on Monday. As I was about to go to dinner, I stepped into his office and asked him if he wished those policies renewed. I referred to these policies, and he said that he did n't think they would be renewed, because he thought that Mr. Baker had reduced his stock and would not require the policies, but that if he wanted the insurance he would let me know. I went out of his office to dinner then, and that is the last I heard of it until after the fire. I did n't say anything in reply to that. I did not understand at that time that Judd intended for me to hold these policies just as I had held them for a day or two before. That was not the impression that was left on my mind at that time. Mr. Hosley was not there. I did not have any conversation with Mr. Hosley, or in his presence with Mr. Judd, in relation to these policies at any time on Monday. I was not in the

office at three o'clock that afternoon, and don't remember seeing Mr. Hosley that day. I wrote the word 'Hold' there to cover those two policies, and I wrote it Saturday night. It has never been erased. The book is only to show the expiration of policies and as a convenience to show how the policies are disposed of. I did not go back from Mr. Judd's office that day when I understood that this policy was not to be renewed and erase the word 'Hold,' because I didn't do it in any case. Mr. Judd told me Monday that he had not seen Mr. Baker since Saturday, and he said he was reducing his stock and he did not think that he would want the policies, and said it in a way that I did not promise to hold it any longer. He was about to go to his dinner, and he lived but a short distance from Mr. Baker's shop, and the impression that he gave me was that he would go to see Mr. Baker. He said in so many words not to renew the policies. I asked him if I should renew those policies, and he said, 'No.'"

No further talk with reference to the alleged oral contracts of insurance occurred, and no act was done with respect thereto.

On the morning of Friday, March 25, 1892, the plaintiffs' factory and the stock and machinery therein were burned. The plaintiffs made due proof of loss; and it was admitted at the trial that, if the plaintiffs were entitled to recover at all, they were entitled to recover the full amount claimed.

There was no evidence that the plaintiffs, or any one in their behalf, ever paid or tendered any premiums in respect of the alleged contracts of insurance to either of the defendants, or any one representing them, or that any credit was expressly or impliedly given therefor, except as herein stated. The defendants never demanded the premiums. Charles H. Baker testified that it was Judd's custom to bring his policies to him at his convenience, and that he never paid for them until Judd brought them.

The plaintiffs' factory was about a mile and a half or three quarters from Judd's place of business. Both were connected by telephones which were working as the majority of telephones were then working in Springfield. Judd lived about a mile and three quarters from his office, and was accustomed to go to and from his home by street railway cars or his own private team. Baker lived in Springfield, about half a mile away from Judd,

and there were social relations between them in addition to their business relations.

Baker and Judd did not meet between the time of the expiration of the policies and the day of the fire, but Baker was in Springfield during that interval, and was at his place of business daily. Judd was in Springfield during the interval, and at his place of business daily, but at the time was not in good health. There were two clerks, one man and one woman, in Judd's office.

In respect to the extent of the authority of Weaver to act for the defendants, it was admitted that the firm of Ladd Brothers and Company were the agents of each of the defendants for the purpose of issuing written policies of insurance. In addition to that admission, Weaver testified substantially as follows: "We have been many years in the insurance business. It is our sole business. We have been agents for the Commercial Union for fifteen or twenty years, and for the Westchester three or four years. Our appointment is in writing. We in fact issued all the policies from the defendant companies in Springfield and vicinity, and they are all countersigned by us as agents. I supposed that I had a right to write the word 'Hold,' and bind the company over Sunday. This has been our habit with respect to these companies all the time since we have been their agents. I can't say whether the companies knew of it. Mr. Brush, who is the general agent of the Commercial Union, knew we were holding policies in that way say for half a day, and that the effect of that was to continue the insurance for that time. There has never been anything said about it between us. When we mark the policies 'Hold,' it is either to go over Sunday or a holiday, where we cannot see the party. I presume there have been cases where we mark them 'Hold' where it was not Sundays or holidays. As a rule, the time is limited that we hold it."

Hosley testified that there had been dealings between the two offices all the time while he had been with Judd; and he had never heard of any limitation of Ladd Brothers and Company's power as agents of any of the companies they represented.

The plaintiffs' policies which expired March 20, 1892, were introduced in evidence. The following is an extract from each policy in suit: "This policy shall not be valid unless counter-

signed by the duly authorized agent of the company at Springfield, Mass. . . . Countersigned this 20th day of March, 1891. Ladd Bros. & Co., Agents."

The plaintiffs were permitted to offer the testimony of Hosley and of two persons experienced in the business of insurance with respect to the custom among insurance agents as to holding insurance binding. Upon that subject Hosley testified that, as to the renewal of old policies, it was customary in Springfield to give the agent notice to hold the policy expiring, that is, to hold the policy in force subject to receiving a notice of renewal until he received a notice to either drop or to renew or write up the policy; that the meaning of the term "Hold" was to keep the policy in force; that the insurance was supposed to continue until the agent received a notice to drop or to renew it, no matter how long; that it was not wholly intended to meet an emergency over a Sunday or a holiday where the parties could not meet, but until the agent could see the assured; that it was customary to hold until notice, or until either he was able to see his principal or his principal was able when he saw him to decide what he would have; and that he had known of cases where insurance was held for a week, and even for a month.

Horace V. Freeman, who had been engaged in the insurance business for twenty-five years and was thoroughly familiar with insurance matters, testified that there was a usage or custom among insurance agents to "hold" policies, which meant to hold the insurance binding until a notice was given that it was to be discontinued within a reasonable time, and that it applied to new insurance and renewals, and referred to the company in which the insurance expired.

Upon cross-examination, he testified that the usage of holding was a temporary expedient until the policy could be written; that the time within which, under the usage, a policy could be held was limited by its reasonableness under the special circumstances of each case; that, apart from the circumstances, there was no usage as to what a reasonable time was; and that there were such things as written vouchers, so called, in customary use, which were used where the risk was to be continued any length of time, two or three weeks, but were not always used even then.

William A. Cone, who had been engaged in the insurance business in Springfield about twenty-four years and was the representative there of nineteen companies, testified that there was a custom to hold insurance binding at the request of the assured, or a broker, in emergency cases; that such an arrangement was not confined to Sundays and holidays; that if a policy was marked "Hold," the duration of it would be a reasonable time under the circumstances; that if a policy was marked "Hold," and neither party took any further steps in regard to it for two or three or four days, he should say that the company would be holden; and that, under the custom of transacting business, that would not be an unusual time for a policy to be held.

On cross-examination, he testified that if a policy expired on Sunday, and was marked "Hold" and nothing more, whether it meant that a reasonable time was to hold it until the Sunday had passed by depended upon the understanding had with the assured.

Upon re-direct examination, he testified that, if there was an understanding as to holding insurance, "it is a custom to hold it until the parties meet again and speak about it," if within a day or two, or a week.

At the close of the evidence, the defendants requested the following instructions to the jury:

"1. Upon all the evidence, the plaintiffs are not entitled to recover.

"2. There is a variance between the evidence and each and every count of the declaration, and the plaintiffs are not entitled to recover thereon.

"3. There is no evidence which would warrant the jury in finding that Ladd Brothers and Company had authority to make for the defendants, as its agent, the contract of insurance alleged in either count of the declaration, or testified to by the witness Hosley, or relied upon by the plaintiffs.

"4. Without payment in some form, or offer or tender of payment to the defendants, or their agent, of the consideration for the alleged promise and agreement of the defendants, this action cannot be maintained, and the verdict must be for the defendants.

"5. If the jury find that the contract made between the plain-

tiffs and defendants, acting respectively through Judd and Weaver, was that the policies should be "held," that is, that the insurance expressed in the policies should be continued in force until Judd could see the plaintiff Charles H. Baker, and ascertain his wishes, in such case the insurance continued in force, not until Judd in fact saw Baker, but only for such reasonable time as would afford Judd a reasonable opportunity to see Baker, ascertain his wishes, and communicate them to Weaver; and in determining what such reasonable time was, they had the right to consider where he lived, the conveniences or inconveniences of communication, and all other facts.

"6. As matter of law, upon the facts disclosed in the testimony for the plaintiffs with respect to the places of business of Judd and Baker, the place of their respective residences, the telephonic communication between their places of business, Judd's habit of driving to and from his office, and the clerks in Judd's office, the reasonable time given Judd in which to see Baker had expired before the time of the loss, and the insurance was not then in force."

The judge refused to give the first four instructions requested, gave the fifth, and refused to give the sixth; and to the refusals to rule as requested the defendants excepted.

At the time these requests and refusals were made, the declaration consisted of three counts only; but as the jury were about to receive the instructions of the judge, the plaintiffs amended by adding to their declaration the fourth and fifth counts. Thereupon the defendants renewed their requests for instructions; and, the judge declining to give them, except as above stated or herein given, the defendants excepted. The defendants then, in addition, requested the judge to rule that there was no evidence which would warrant the jury in finding a verdict for the plaintiffs on the first, second, third, or fourth counts of the declaration, respectively. The judge refused so to rule; and the defendants excepted.

The judge, among other things, instructed the jury as follows:

"You are to look at the parties and their situation, what they knew about each other, whether there had been dealings before, and whether the plaintiffs in the cases had had credit with these companies before, because if they had, if the insurance companies

had trusted the plaintiffs before, or if they had let the question of premium remain until after the policies had run, or until after they had expired, you would naturally infer that there was something of the sort if nothing was said about it. So that, while the question of premium is an element in the case, it is not necessary that it should have been expressly agreed upon, in order that you should find that there was a contract or agreement for insurance, because from the circumstances you might find that credit was given. . . .

"It is said, in the first place, that a contract was made on the 19th. What was it if it was made? Was it an agreement that they should hold this property insured for Sunday only? If it was, if that was all that was done on Saturday, then unless something more was done on Monday, evidently that contract (made on Saturday, if it was limited to Sunday) would not avail the plaintiffs here, because the fire occurred four or five days after. . . .

"Now I have stated to you that there may be, so far as I know, a valid oral contract of insurance for a long period. But when you come to deal with an agent I think that I ought to state to you that, in the case of an agent acting for or representing insurance companies, unless some express authority is given which shows some further power or authority, unless some direction is given beyond what the mere fact of acting as agent implies or carries with it, an agent has only the power to make valid oral contracts of insurance for some temporary purpose incidental to the issuing of policies for long periods of time. That may have some bearing upon the question of what this contract was, whether it was an indefinite period, or whether it was a definite one; whether it was until Mr. Judd could see Mr. Baker, or whether it was for only over Sunday, or what it was; because in determining whether a certain contract is made, it is proper for the jury to look into all the facts and the circumstances, and the rights and the powers of all the parties who participate in the transaction.

"Some of the witnesses in this case have instanced two cases in which valid oral contracts are made, as they speak of them, cases of emergency. Those refer to Sundays and holidays. I do not understand that they intended to say, and I think they could

hardly say, that those are the only cases in which such temporary valid oral contracts of insurance might be made.

“If you come to the conclusion that a contract of insurance was made until Mr. Judd could see Mr. Baker, the question, it seems to me, appears to be whether or not a reasonable time had expired for that before this fire occurred. Because, if there was an agreement to hold valid insurance upon the plaintiffs’ property until something could be done, and no time was mentioned, then it would not be fair to say that that insurance meant for a year or anything like it, unless, indeed, it was some occurrence that would require that length of time. Where a party agrees to do a thing and no time is mentioned, then the law gives him a reasonable time. So that if the agreement between the representatives of these defendant companies and Mr. Judd was that they would hold insurance for a reasonable time for Mr. Baker to be consulted, or to determine some question about it, then you come to the question, which in that case would be a very important one, whether or not a reasonable time had expired. If it had, and Mr. Baker or his agent, Mr. Judd, by their default or by his default, or by his neglect, had omitted to do what they ought to do within a reasonable time, and any loss occurred, then it is due to the neglect or default of Mr. Judd or of the plaintiffs, and that loss cannot be visited upon the defendants.

“So that the questions in this case generally, I think, come down to this: Was there an agreement, valid oral agreement, for insurance here? what were the terms of it agreed upon? or if one of the terms was not agreed upon, to wit, the length of time for which they should hold it, — was left for something to be done, and that was not agreed upon, — was that thing done within a reasonable time? . . . If the contract was that the defendants were to hold insurance on the plaintiffs’ property valid and good until notice was given by one side to the other, — that the risk was to stand no longer, — then it should stand until notice was given by one side to the other.

“The real question is whether, upon all the facts and circumstances in the cases, these defendant companies had a risk on the plaintiffs’ property on the morning of the 25th of March, when the fire destroyed it; and to that all these other questions

are subsidiary, and all the evidence in the cases has any importance only as it bears upon that ultimate question in the case.

"If the jury find that the contract made between the plaintiffs and the defendants, acting respectively through Judd and Weaver, was that the policies should be held, that is, that the insurance expressed in the policies should be continued in force until Judd could see the plaintiff Charles H. Baker, and ascertain his wishes, in such case the insurance continued in force, not until Judd in fact saw Baker, but only for such reasonable time as would afford Judd a reasonable opportunity to see him and ascertain his wishes, and communicate with Weaver.

"In determining, I will add, what such reasonable time was, you have a right to consider where they lived, what the means of communication were between them, and all other facts and circumstances in the case. That I think renders unnecessary two or three other requests which have been made in that respect."

There were no exceptions to the charge.

The jury returned a general verdict for the plaintiffs in each case; and the defendants alleged exceptions.

W. H. Moody, for the defendants.

H. P. Moulton & R. W. Boyden, for the plaintiffs.

KNOWLTON, J. The only exception in these cases is to the refusal of the presiding justice to give the jury certain instructions requested by the defendants. No exception was taken to the instructions given.

1. There was evidence to warrant the jury in finding verdicts for the plaintiffs. The jury might well find that the agent of the defendants, when the policies of insurance were about to expire, agreed with the agent of the plaintiffs to hold the policies in force as valid contracts of insurance on the terms stated in them for an additional time for the purpose of enabling the plaintiffs' agent to ascertain on what terms they wished to take policies in writing, and until one of the parties should terminate the temporary arrangement; or, under another possible construction of the contract, until the arrangement should end by the expiration of the reasonable time which was agreed to be allowed for that purpose, and that while the policies were so held in force the property insured was burned.

2. It is conceded by the defendants that, after the allowance of the amendments to the declaration, the jury could not properly have been instructed that there was a variance between the evidence and each and every count of the declaration. A request was then made for a ruling "that there was no evidence which would warrant the jury in finding a verdict for the plaintiffs on the first, second, third, or fourth counts of the declaration respectively." We understand this to have been a request in regard to each count considered by itself alone. If, as applied to either count, it embodied a correct proposition of law, and if the defendants were prejudiced by the failure to give it in terms, the exceptions must be sustained.

The first and third counts describe the contract relied on as an agreement to insure the property for one year from March 20, 1892. We are of opinion that the arrangement between the agent of the plaintiffs and the agent of the defendants, in regard to which the testimony was somewhat contradictory, cannot be interpreted as a contract to insure property for one year, either on the terms stated in the policies of insurance which expired about that time, or on any other terms. It was understood by both parties as a temporary arrangement incidental to a contemplated contract in writing soon to be made, or to future negotiations for such a contract. We are of opinion that there was evidence which would have warranted the jury in finding for the plaintiffs on either the second, fourth, or fifth counts. The testimony gave the jury a great deal of latitude in determining what the contract was. There was quite a variety of statement in regard to what occurred between the agents of the parties, and there was testimony from numerous witnesses who were not in entire accord in regard to the usage of insurance agents when asked to hold a policy which is about to expire. Assuming, as we must from their verdict, that the jury believed the testimony which was favorable to the plaintiffs, it seems probable, in view of the relations existing between the two agents and the proximity of their offices in the same building, that the agreement was found to be as stated in the fourth count of the declaration, that the insurance should be continued in force "until terminated by notice from one party to the other," it being understood that the arrangement was only temporary. No demurrer

was filed, and no objection was taken to the form or sufficiency of the allegations in either count of the declaration.

In regard to the first and third counts, the defendants were right in their contention. The important question is whether they were injured by the refusal to give in terms the instructions requested. If we were warranted in saying that the jury may have found for the plaintiffs on either of these counts instead of one of the others, we should be constrained to sustain the exceptions. Ordinarily, if there is no evidence to warrant a verdict for the plaintiff on a particular count of a declaration, the defendant has the right to have the jury so instructed if he requests it; but in the present case it sufficiently appears that the jury could not have gone astray on account of the failure to give this instruction in terms. The only contract relied on was oral, and the judge gave the jury very full instructions in regard to the rights and powers of insurance agents to make oral contracts of insurance. He told them that, unless some authority is given beyond what was shown in this case, "an agent has only the power to make valid oral contracts of insurance for some temporary purpose incidental to the issuing of policies for long periods of time." He then referred to cases of emergency—Sundays and holidays—mentioned by some of the witnesses, and said he did not think the witnesses intended to say that those were "the only cases in which such temporary valid oral contracts of insurance might be made." He referred to the different possible views of the arrangement between the parties, and while he did not in express words say that the jury could not find such a contract as is alleged in the first or third counts of the declaration, the whole tenor and purport of the charge were, we think, such that the jury must have understood that they could not find any other valid contract than a temporary contract incidental to the issuing of a policy, and therefore that there could be no finding for the plaintiffs under the first or third counts. We think the defendants were not injured in this part of the case.

3. There was evidence to warrant the jury in finding that the defendants' agent had authority to make an oral contract of insurance such as the plaintiffs relied on. That insurance agents have long been accustomed to make such contracts was

testified to by numerous witnesses, and it is a fact of common knowledge. That such contracts are legal and binding has often been decided by the courts. *Sanborn v. Fireman's Ins. Co.* 16 Gray, 448. *Putnam v. Home Ins. Co.* 123 Mass. 324.

4. Such a temporary contract is valid when there is no payment or tender of payment of the premium, if the agent chooses to give the insured credit. To give credit in such cases is a common practice of insurance agents, and within the apparent scope of their authority. *Angell v. Hartford Ins. Co.* 59 N. Y. 171. *Bouton v. American Ins. Co.* 25 Conn. 542.

5. In their sixth request for instructions the defendants asked to have the jury told that the insurance was not in force at the time of the loss because the reasonable time given to Judd in which to see Baker had then expired. This request was founded on an assumption that the only contract which the jury could find on the evidence was a contract to continue the policies in force until Judd could see the plaintiff Charles H. Baker, and ascertain his wishes in regard to the insurance. But this was not the only construction that could be put upon the evidence. We think the jury believed that Judd and Weaver both understood at the time of their interview that the policies should be held in force temporarily for an indefinite period, until there should be some further communication between them in regard to the matter. If that was so, the policies would remain in force, in the absence of any notice by either party to the other, even if the time that was reasonably necessary to enable Judd to ascertain facts had elapsed. *First Baptist Church v. Brooklyn Ins. Co.* 19 N. Y. 305.

That the jury might give the contract a construction different from that assumed in the request is enough to justify the judge in his refusal to give the instruction, and we have no occasion to inquire whether the facts were so clear as to make the question what was a reasonable time to enable Judd to see Baker a question of law, or, if this question entered into the verdicts of the jury, whether it was rightly decided by them.

Exceptions overruled.

EDWARD H. LIVINGSTON vs. EDWARD A. HAMMOND.

Essex. November 7, 1894. — November 27, 1894.

Present: FIELD, C. J., ALLEN, KNOWLTON, & BARKER, JJ.

*Auditor's Report — Parent and Child — Liability of Step-son to Step-father for
Necessaries furnished during Minority — Finding — Estoppel.*

If the only evidence introduced at the trial of a case is an auditor's report, the judge, who hears the case without a jury, is not obliged to accept the conclusions of the auditor upon the facts stated in his report, but may consider all the facts in their relation to one another, and draw any proper inferences from them and reach any conclusion that they will warrant.

A man is not bound to maintain the children of his wife by a former marriage, but, if he chooses to receive them into his family and to assume the relation of a parent to them in their daily life, the law will not imply a contract on his part to pay them for services which they render him while members of his family, nor a contract on their part to pay him for their maintenance.

In an action, upon an account annexed, by a step-father for necessities alleged to have been furnished to his stepson during the latter's minority, it appeared that, as an act of charity, the plaintiff had paid the rent of a house for the defendant's mother and her children for several months before his marriage to her; that after the marriage he and she and her children lived together as one family for nearly seven years; that so long as his business was prosperous, he supported them liberally, "treating the children as he would had they been his own, furnishing them spending money, and providing for them as a liberal father in his circumstances would provide for his own sons"; that for nearly three years of the time covered by the account annexed the defendant was earning small sums of money, all of which were paid to his mother and used for the support of the family; that during all the time covered by this account the defendant's brother was in like manner earning money and paying it to his mother for the same purpose, and the plaintiff's earnings, after he ceased to be prosperous, were contributed to the common fund and put to the same use; that the defendant's mother also earned some money, and her relatives made contributions for the support of the family; and that no accounts were kept of the amounts received from these different sources. *Held*, that these facts warranted a finding for the defendant.

It seems, that a step-father, by his conduct in procuring the preparation and allowance of a probate account in which his step-son is held liable for his maintenance while a member of his step-father's family to his mother as guardian, and by the step-son's action in settling this claim, is estopped from recovering against the step-son for the latter's maintenance during the time covered by the probate account.

CONTRACT, upon an account annexed, for board, clothing, and other necessities alleged to have been furnished by the plaintiff to the defendant while the latter was a minor.

The case was referred to an auditor, and was tried in the Superior Court, without a jury, before *Hammond, J.*, upon the auditor's report; and no other evidence was introduced.

At the trial, the plaintiff requested the following rulings: "1. As matter of law, upon the facts found by the auditor, the plaintiff is entitled to judgment. 2. As matter of law, upon the facts found by the auditor, the defendant is not entitled to judgment."

The judge declined to rule as requested, and found for the defendant; and the plaintiff alleged exceptions. The facts sufficiently appear in the opinion.

M. E. Pingree, for the plaintiff.

I. A. Abbott, for the defendant.

KNOWLTON, J. The only evidence introduced at the trial of this case was the auditor's report, and the question is whether the judge who heard the case without a jury was bound, as matter of law, to find for the plaintiff. The judge was not obliged to accept the conclusions of the auditor upon the facts stated in the report, but might consider all the facts in their relation to one another, and draw any proper inferences from them and reach any conclusion that they would warrant. *Hamilton v. Boston Port & Seamen's Aid Society*, 126 Mass. 407. *Emerson v. Patch*, 129 Mass. 299.

The plaintiff is the step-father of the defendant, and there was abundant evidence to warrant a finding that, on his marriage with the defendant's mother, he put himself *in loco parentis* to the defendant, and made him one of his family in precisely the same way as if he had been his own son. A man is not bound to maintain the children of his wife by a former marriage, but if he chooses to receive them into his family, and to assume the relation of a parent to them in their daily life, the law will not imply a contract on his part to pay them for services which they render him while members of his family, nor a contract on theirs to pay him for their maintenance. *Mulhern v. McDavitt*, 16 Gray, 404. *Williams v. Hutchinson*, 3 Comst. 312. *Sharp v. Cropsey*, 11 Barb. 224. *Lantz v. Frey*, 14 Penn. St. 201. *Hussey v. Roundtree*, Busb. (N. C.) 110. *Bush v. Blanchard*, 18 Ill. 46. *Gillett v. Camp*, 27 Mo. 541. *Murdock v. Murdock*, 7 Cal. 511. *Smith v. Rogers*, 24 Kans. 140. *Davis v. Goodenow*, 27

Vt. 715. The law approves and encourages the assumption of such a relation, as promotive of the best interests of all parties by uniting them in an orderly family life. If nothing more appears than helpfulness in such relations, it will not permit an implication of a contract to make compensation in money on either side. It will presume, also, that what was done proceeded from a higher attribute of human nature than the desire to bargain and get gain, namely, an unselfish love of a parent for his children and of the children for their parent. Of course there may be circumstances in any case which will rebut the ordinary presumption from the residence together in the same family of persons so related, and will call for an inference that the step-father was not acting *in loco parentis*, but in a different relation.

In the present case we are of opinion that the weight of the evidence was greatly in favor of the finding of the judge. It appears that as an act of charity the plaintiff had paid the rent of a house for the defendant's mother and her children for several months before his marriage to her. After the marriage he and she and her children lived together as one family for nearly seven years. So long as his business was prosperous he supported them liberally, "treating the children as he would had they been his own, furnishing them spending money, and providing for them as a liberal father in his circumstances would provide for his own sons." For nearly three years of the time covered by the account annexed to the plaintiff's declaration the defendant was earning small sums of money, all of which was paid to his mother and used for the support of the family. During all the time covered by this account the defendant's older brother was in like manner earning money and paying it to his mother for the same purpose, and the plaintiff's earnings, after he ceased to be prosperous, were contributed to the common fund and put to the same use. The defendant's mother also earned some money, and her relatives made contributions for the support of the family. No accounts were kept of the amounts received from these different sources. In all these facts there is nothing to control, but much to strengthen, the ordinary inference from residence in the same family, that the plaintiff and the defendant were not dealing with each other as parties contracting

either expressly or impliedly in matters of business, but with a purpose to be mutually helpful as parent and child. The rulings requested were, therefore, rightly refused.

There is strong ground for the defendant's contention that the plaintiff is estopped from recovering by his conduct in procuring the preparation and allowance of a probate account, in which the defendant is held liable for his maintenance during this time to his mother as guardian, and by the defendant's action in settling this claim;* but this presents a question which it is unnecessary to decide. *Exceptions overruled.*

WILLIAM K. SIDDALL vs. PACIFIC MILLS.

Essex. November 8, 1894. — November 27, 1894.

Present: FIELD, C. J., ALLEN, KNOWLTON, & BARKER, JJ.

Personal Injuries — Negligence of Fellow Servants — Duty of Employer to inexperienced Boy.

If, in an action for personal injuries, it may be assumed in favor of the plaintiff, a boy thirteen years old, without deciding the point, that the risk of particular dangers from the negligence of fellow servants may sometimes be so great and so obvious to the employer that he ought to give an inexperienced boy warning and instruction in regard to them, he is called upon so to do only when he himself ought reasonably to appreciate them, and when his instruction would be likely materially to diminish the danger to his employee; and there is no evidence to warrant a finding that he owed the plaintiff such a duty, if the danger of injury was remote and improbable, and nothing which the plaintiff could have done consistently with the expeditious transaction of the work could have relieved him from the possibility of the accident.

TORT, for personal injuries occasioned to the plaintiff while in the employ of the defendant corporation.

* The defendant, who inherited some property from his grandfather, settled with his mother as guardian after he became of age, not by paying her the amount allowed in the probate account, but by an arrangement for her support, she having separated from her husband, the plaintiff, who resided in England, and had not contributed to her support for several years; and she released the defendant from all claims against him as guardian.

At the trial in the Superior Court, before *Bond, J.*, the plaintiff offered evidence tending to prove the following facts.

He entered the employ of the defendant on July 5, 1892. He was thirteen years of age and had never before worked in a mill or about machinery, and this fact was known to the overseer of the bleaching-room, one Paisley, who hired him, and to the second hand of the room, one Campbell, who set him at work in a part of the room where other boys were employed, telling him that one of the boys would show him what to do. The work that he was then set to do required him to guide cloth into a wooden vat, involved no knowledge of machinery, and exposed him to no danger. In another part of the room were several large wrought iron tanks, about twelve feet in depth and about ten feet in diameter, in which cloths were treated in the process of bleaching by the use of steam and a hot solution of caustic soda. In the top of the bleaching tanks were two man-holes large enough to admit a small boy. By means of rollers attached to the ceiling of the room, the pieces of cloth to be bleached, which were sewed together so as to form one continuous strip of eight hundred pieces of from forty to forty-five yards in a piece, were conducted into the bleaching tanks through one of the man-holes. A boy in each tank would direct the strip of cloth as it came from the rollers so as to distribute it evenly and compactly into the tank. When the tank was filled with cloth to within two or three feet of the top, a boy would cover the mass of cloth with pieces of burlap. The boy would then leave the tank, and the man in charge of the tanks, one Elliott, would fasten the covers of the man-holes and would open the valve in the caustic soda solution pipe connected with the bottom of the tank, and the caustic soda solution would ooze up through the mass of cloth. When all the caustic soda solution was thus transferred into the bleaching tank, it would saturate the mass of cloth up to within about three inches of the top of the cloth. By opening the valve in a steam pipe which was also connected with the bottom of the bleaching tank, steam was then admitted, and the cloths were treated to a boiling process for five or six hours.

The bleaching tanks were so constructed that the bottom halves of them were below the floor of the room in which the

plaintiff was at work, so that the valves and pipe connections were visible to one only when he went into the cellar.

On the afternoon of July 7, the plaintiff, who had never been in the cellar and who had never observed or had anything to do with the bleaching tanks, was taken away by Campbell from his work previously described, and told by him that he was about to learn something new, and was further told by him to go to work upon the bleaching tanks, and that Elliott, who had special charge of the bleaching tanks for several years under the overseer and second hand, would show him what to do.

Under Elliott's direction, the plaintiff went into one of the tanks and spread the pieces of burlap over the cloth which had previously been packed in the tank by another boy. It took the plaintiff from ten to fifteen minutes to do this work, and when it was done he went back to the other part of the room and resumed his regular work.

He was called by Elliott two or three times during the rest of the afternoon to do the same thing in the bleaching tanks.

On the morning of July 8 he was again called by Elliott, and directed to go into one of the bleaching tanks and spread the burlaps over the mass of cloth. It was dark inside of the tank, but it was not so dark but that the plaintiff could see to do the work of spreading the burlaps over the cloth as some light came in through the man-holes.

The cloth had been packed by another boy, and in the mass of cloth there was a depression three or four inches deep, caused by that boy in standing on the cloth while doing his work. As the plaintiff was on his hands and knees on top of the cloth in the tank and reaching out in the darkness, spreading the burlap, he put one of his hands into the depression, which he was unable to see, and, losing his balance, fell over on his side into a pool of the caustic soda solution, which had been negligently turned on to the bleaching tank by Elliott, and which had oozed up through the cloth and filled the depression, and was severely scalded and burned by the solution.

Elliott, who was called as a witness for the plaintiff, testified that he turned on the caustic soda solution either before or after he sent the plaintiff into the tank, and that he did it through a mistake.

The plaintiff was entirely ignorant of the process that was carried on in the bleaching tanks, did not know that a solution of caustic soda was used in them, did not know that caustic soda would burn, was never cautioned, warned, or instructed by anybody, and did not know or learn from any source, that the work in the bleaching tanks was dangerous.

Elliott had been told several times by the overseer of the room never to turn on the caustic soda solution in the bleaching tanks until after the boys had finished their work in them; but the overseer had never made any particular observation to see whether his instruction in this respect was complied with by Elliott.

Paisley and Campbell, who were called as witnesses for the plaintiff, testified that they knew at the time of his employment that he had never worked in a mill before, and that they had never given him any warning or instruction as to his work, or as to the possibility of Elliott's turning on the caustic soda solution prematurely; and that neither of them ever knew nor had reason to know or believe that Elliott, who had been in the employ of the defendant in charge of said tanks for several years prior to the date of the plaintiff's injury, had ever before violated his instructions not to turn on the solution of soda and hot water until the boys were out of the tanks.

The bleaching-room was about eighty feet in length and about forty-five feet in width, and the overseer's office was in about the centre of the room, in which were employed about fifty persons, men and boys.

Upon this evidence the judge directed a verdict for the defendant, and, at the request of the plaintiff, reported the case for the determination of this court. If the facts disclosed any cause of action against the defendant, the plaintiff was to have leave to amend his declaration, if necessary; and if, upon the foregoing evidence upon any form of declaration the plaintiff was entitled to maintain an action at common law against the defendant, then the verdict was to be set aside and a new trial granted.

J. P. Sweeney, for the plaintiff.

E. T. Burley, for the defendant.

KNOWLTON, J. The direct and proximate cause of the injury from which the defendant suffered was the negligence of a

fellow servant. It was negligence of such a kind that no instruction which the defendant could have given the plaintiff in regard to the method of doing his work would have been likely materially to diminish the risk of injury from it. The risk of injury from negligence of his fellow servants is one which an employee assumes by virtue of his contract to engage in the service, even though neither he nor his employer can foresee the dangers which may result from such negligence. Ordinarily, the employer is not called upon to instruct a young and inexperienced person in regard to dangers which can only result from the negligence of fellow servants. It is not to be presumed that others will neglect their duties, and a boy cannot expect to be instructed as to what to do in a situation which is not to be expected in the ordinary course of the business, and which can only exist through the fault of another. But if we assume in favor of the plaintiff, without deciding, that the risk of particular dangers from this cause may sometimes be so great and so obvious to the employer that he ought to give an inexperienced boy warning and instruction in regard to them, he is called upon so to do only when he himself ought reasonably to anticipate them, and when his instruction would be likely materially to diminish the danger to his employee. In the present case there is no evidence to warrant a finding that he owed the plaintiff such a duty. The danger of such an injury was very remote and improbable. It could only come from negligence which the employer had no reason to expect. Moreover, nothing which the plaintiff could have done consistently with the expeditious transaction of the work could have relieved him from the possibility of such an accident. The solution of caustic soda might be turned on after he had entered the tank through the man-hole, as well as before, and he would have no means of knowing it. In the present case, Elliott, who was called by the plaintiff, testified that he turned it on either after or before, without professing to know more definitely. We are of opinion that there was no evidence on which the jury could have found that the accident resulted from failure of the defendant to perform any duty which it owed to the plaintiff.

Judgment on the verdict.

LOUIS TREMBLAY vs. GEORGE W. HARNDEN.

Essex. November 8, 1894. — November 27, 1894.

Present: FIELD, C. J., ALLEN, KNOWLTON, & BARKER, JJ.

*Personal Injuries — Master and Servant — Defective Machine — Evidence —
Argument to Jury.*

In an action for personal injuries occasioned to the plaintiff, while in the defendant's employ, by the alleged defective condition of a machine upon which he was working, if the defect testified to by the plaintiff's witnesses is the state of the pulleys which were used in running the machine, and there is evidence that the pulleys were in the same condition at the time of the trial, that the working condition of the machine was the same, and that the speed of the engine and machinery was the same at the time when the speed was taken as at the time of the accident, evidence of what that speed was, that the machine and pulleys were in good condition at the time of the trial and at other times shortly before and after the accident, and that the machine worked perfectly before and ever since the accident, is competent; the admission of such evidence being limited to the purpose of showing what the condition of the machine was, and how it operated at the time of the accident.

In an action for personal injuries occasioned to the plaintiff, while in the defendant's employ, by the alleged defective condition of a machine upon which he was working, the fact, as appears from the defendant's testimony, that he was insured against accidents, is not a subject for a legitimate argument by the plaintiff to the jury.

TORT, for personal injuries occasioned to the plaintiff while in the defendant's employ. At the trial in the Superior Court, before *Richardson, J.*, it appeared that the plaintiff, when injured, was working upon a machine called a heel-presser, which was operated by pulleys regulated by a break, and to which power was communicated by applying the foot to a treadle. It consisted also of a fixed headpiece and a movable plate on which heels were placed, and by coming in contact with the headpiece the necessary pressure on the heels was obtained.

It further appeared that the injuries were caused by the plaintiff having his hands caught between the headpiece and the plate, while removing some heels which stuck to the plate.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions, which appear in the opinion.

H. F. Hurlburt & J. F. Quinn, for the plaintiff.

W. H. Niles & G. J. Carr, for the defendant.

KNOWLTON, J. The plaintiff's principal exception is to the admission of certain testimony to show that the machine on which he was working was not defective at the time of the accident, as he contended that it was. The defect testified to by the plaintiff's witnesses was an accumulation of oil and dust on the leather surface of one or both of the pulleys which were used in running the machine, forming a sticky substance which made the pulleys adhere when they should separate, and caused the machine to "repeat," or produce an unexpected movement of the plate upwards, caused by a continued revolution of the pulley after the foot was removed from the treadle. The pulleys were produced in court, and one of the plaintiff's witnesses testified that the leather on one of them was "not in proper condition to use," and that there was a "gum on it that would cause the pulleys to adhere." There was evidence from the defendant's witnesses that the pulleys were in the same condition as at the time of the accident, that the working condition of the machine was the same, that the oil or sticky substance would not cause the machine to repeat, and that if any sticky substance caused it to repeat it would continue to repeat. There was also evidence that the speed of the engine and the machinery was the same at the time when the speed was taken by Knox and others as at the time of the accident. The plaintiff excepted to the admission of evidence from divers witnesses of what this speed was, that the machine and pulleys were in good condition at the time of the trial and at other times shortly before and after the accident, and that the machine worked perfectly before the accident and had worked perfectly ever since. The jury were instructed that the evidence was admitted only for the purpose of showing what the condition of the machine was and how it operated at the time of the accident, and that they should consider the testimony only so far as it might have a tendency to show these facts.

We are of opinion that the evidence was clearly competent. By other testimony it was closely connected with the question in issue, and it had a direct bearing upon it. It did not introduce such remote or collateral issues as to tend to confuse the jury or interfere with the orderly course of the trial. *Bemis v. Temple*, ante, 342. *Shea v. Glendale Elastic Fabrics Co.*, post, 463.

The defendant had testified that he was insured against accidents, and the only other exception is to the refusal of the judge to permit the plaintiff to argue to the jury that the defendant would be likely to be less careful in looking after his machinery than if he had not been insured. We are of opinion that the judge was right in this refusal. It does not appear that the defendant relied upon his insurance in any way as a defence to this suit, and very likely the fact of insurance was brought out in cross-examination. It was not a subject for legitimate argument to the jury. *Exceptions overruled.*

LE GRAND RAMSEY vs. EDWIN D. HUMPHREY.

Berkshire. September 12, 1894. — November 28, 1894.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

Partition — Statute — Report of Commissioners — Order for Sale of Land.

Under Pub. Sts. c. 178, § 65, providing that "In any case of partition the court may, at the time of appointing commissioners, or subsequently by agreement of parties or after such notice to all persons interested as may be required, order the commissioners to make sale and conveyance of the whole or any part of the lands that cannot be advantageously divided, upon such terms and conditions and with such securities for the proceeds of such sale as the court may direct, and to distribute and pay over the proceeds of the sale in such manner as to make the partition just and equal," a sale may be ordered by the court after the commissioners have made their report.

Upon an appeal from a decree of the Probate Court, on a petition for partition of land held by tenants in common, ordering a sale of the land after the commissioners had made their report, it appeared that the parties were in dispute in regard to the value of the property; that the report of the commissioners setting it off to one of the parties at an appraisal was agreed to by only a majority of the board; and that the principal fact in controversy before the court was one which rested largely upon the opinion of witnesses. *Held*, that the report of the commissioners should be set aside, and the decree for a sale affirmed.

APPEAL from a decree of the Probate Court, upon a petition for partition of land in Great Barrington held by tenants in common, ordering a sale of the land. Hearing before *Barker, J.*, who reported the case for the determination of the full court. The facts appear in the opinion.

H. C. Joyner, for the petitioner.

A. J. Waterman, for the respondent.

KNOWLTON, J. By Pub. Sts. c. 178, § 65, "In any case of partition the court may, at the time of appointing commissioners, or subsequently by agreement of parties or after such notice to all persons interested as may be required, order the commissioners to make sale and conveyance of the whole or any part of the lands that cannot be advantageously divided, upon such terms and conditions, and with such securities for the proceeds of such sale as the court may direct, and to distribute and pay over the proceeds of the sale in such manner as to make the partition just and equal." This is a general provision applicable to all the courts which have jurisdiction to make partition of lands. The principal question in this case is what construction shall be given to it.

Prior to 1870, on an application for partition of lands there was no power to order a sale. Under St. 1870, c. 257, if commissioners to make partition became satisfied that a partition could not be made without great injury, they were to report the same to the court, and the court, after due proceedings, might order a sale to be made by a trustee. This statute was repealed by St. 1871, c. 111, which contained the provisions now incorporated into Pub. Sts. c. 178, § 65. By force of these provisions, the court, subsequently to the time of appointing commissioners, and after such notice to all persons interested as may be required, may order the commissioners to make a sale. The language of the statute is broad enough to authorize the court to pass such an order after the commissioners have made their report as well as before, and we see no reason for giving it a narrow or restricted meaning. Under an ordinary warrant to make partition the commissioners can only divide the estate in equal shares, or if it is incapable of division, or if it cannot be divided without damage to the owners, set off the whole or a part greater than either party's share to any one of the parties who will accept it, he paying to one or more of the others the sum of money awarded by the commissioners to make the partition just and equal. Pub. Sts. c. 178, § 26. We are of opinion that St. 1871, c. 111, was intended to enlarge rather than to restrict the power given to the court by St. 1870, c. 257, which

it repealed. It gives the court power in its discretion to order a sale by public auction in any case where lands cannot be advantageously divided, and at any time before partition has been decreed. It may often happen that the true situation of an estate in reference to the feasibility of dividing it will appear much more clearly after the commissioners have attempted to divide it, or to set off the whole or a large share to one who is to pay money to the others, than before their attempt, and it seems to us that this provision for ordering a sale at any time in the discretion of the court is wise and just.

In the present case a sale was ordered by the Probate Court after the report of the commissioners came in. In the decree, one of the reasons given for ordering the sale was that the commissioners grossly erred in appraising the estate at sixteen thousand dollars when the value of it was more than eighteen thousand. At a hearing in this court on an appeal, the justice found that the fair market value of the land is only sixteen thousand dollars. The principal reason assigned by the Probate Court for its action thus appears to be without foundation, but it does not appear that this was the only reason. We assume that the justice who made the report intended to present all the facts which he deemed material to a final disposition of the case by this court. In this view, although there may be other considerations that do not appear which affected the Probate Court, and which might properly affect this court, in determining what is the most just and equitable mode of making the partition, we are of opinion that the decree for a sale should be affirmed. We are led to this conclusion because the parties are in dispute in regard to the value of the property, because the report of the commissioners setting it off to one at an appraisal was agreed to by only a majority of the board, and because the principal fact in controversy before the court is one which rests largely upon the opinion of witnesses, in regard to which any finding of a court is liable to be erroneous.

Report of commissioners set aside, and sale ordered in accordance with the decree of the Probate Court.

SAMUEL T. FIELD *vs.* LAMSON AND GOODNOW MANUFACTURING COMPANY.

Franklin. September 18, 1894. — November 28, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP,
& BARKER, JJ.

*Corporation — Rights of Holder of Preferred Stock — Statute — Guaranty —
Action — Equity.*

A corporation was authorized by statute to issue preferred stock, the holders of which "shall be entitled to all the privileges of other members of said corporation, including the right to vote upon such stock, in person or by proxy, at all corporate meetings." The statute also provided that "the provisions of law relative to special stock . . . shall not be held to apply in case of stock issued under this act." *Held*, that an owner of such preferred stock must be regarded as a stockholder, and not as a creditor of the corporation.

A statute which authorized a corporation to issue preferred stock provided that "the holders of said preferred stock shall be entitled to dividends upon the same annually, out of net profits, in preference and priority to the holders of any other stock of said corporation, to the amount of such rate per cent thereon, not exceeding seven per cent, as may be determined by vote of said corporation prior to issue of the same, which rate per cent of priority shall be expressed in the certificates of said preferred stock, and shall also share *pro rata* with the holders of the common stock in any excess divided in any year above a dividend on the whole stock at said rate per cent, and dividends to the holders of such preferred stock, at the rate per cent fixed upon, shall be paid for each year from the time of its issue, cumulatively, before any dividends shall be paid upon any other stock of said corporation, and, if so voted and expressed in the certificates, may be guaranteed by said corporation"; and also that "the provisions of law relative to special stock . . . shall not be held to apply in case of stock issued under this act." Prior to the issue of the preferred stock, the corporation determined by vote the rate of dividend to be paid and the form of certificate to be issued, which in its wording followed the statute, including a guaranty of the dividends. *Held*, that the effect of the guaranty was not to make the dividends payable absolutely, whether there were net profits or not, and without regard to the circumstances or situation of the corporation, but to add to the statutory liability the direct undertaking of the corporation that net profits which, in the fair judgment of the officers of the corporation, were available for dividends, should be devoted first of all, as between the preferred stockholders and the holders of any other stock, to the payment of dividends on preferred stock.

A certificate of shares of the preferred stock of a corporation, the issue of which was authorized by statute, provided as follows: "The holder of the stock represented by this certificate is entitled to dividends thereon annually out of net profits, in preference and priority to the holders of any stock of said corporation except the preferred stock issued under said act, to the amount of six per

cent, which rate per cent was determined by vote of said corporation prior to its original issue; and said holder is also entitled to share *pro rata* with the holders of the common stock in any excess divided in any year above a dividend on the whole stock of said company at said rate of six per cent. The holder of the stock represented by this certificate is entitled to dividends upon it at six per cent for each year from the time of its issue, cumulatively, before any dividends shall be paid upon any stock of said corporation except the preferred stock issued under said act, which dividends are guaranteed by said company, a vote of said company to that effect having been passed prior to its original issue." *Held*, that, no dividend having been declared by the corporation, a holder of such certificate could not maintain an action at law against the corporation for the amount of the dividends therein mentioned.

A corporation, under statutory authority, issued preferred stock, the certificates of which provided that the holders thereof were entitled to dividends thereon annually out of net profits, in preference to the holders of any other stock of the corporation, to the amount of a certain rate per cent; that they were also entitled to share *pro rata* with the holders of the common stock in any excess divided in any year above a dividend on the whole stock of the corporation at the rate so fixed; and that they were entitled further to dividends on the preferred stock at the same rate for each year from the time of its issue, cumulatively, before any dividends should be paid upon any other stock of the corporation, "which dividends are guaranteed" by the corporation. The capital of the corporation became seriously impaired, and its indebtedness amounted to a large sum, and was payable on demand or on short time. The assets, though appearing to be largely in excess of the indebtedness, would have suffered a very great shrinkage from the valuation put upon them if disposed of to pay debts or to close up the business. During a portion of the time only were there net profits sufficient to warrant the payment of dividends on the preferred stock at the rate named in the certificates. The directors of the corporation refused to declare dividends, in part because they believed that it would endanger the ability of the corporation to pay its debts, and in part because they did not deem it proper so to do on account of the impairment of the capital. *Held*, that the directors did not appear so plainly to have acted in disregard of the rights of the preferred stockholders as to justify the interference of a court of equity.

CONTRACT, to recover the amount of dividends alleged to be due the plaintiff as the owner of preferred stock in the defendant corporation. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, upon agreed facts, the material parts of which appear in the opinion.

The case was argued at the bar in September, 1894, and afterwards was submitted on the briefs to all the judges.

S. T. Field, pro se.

H. Winn, for the defendant.

MORTON, J. The plaintiff is the holder and owner of thirty shares of preferred stock in the defendant company. Part of

them he obtained from the trustee as a creditor of the company under the indenture of compromise, and part of them he acquired by purchase from another person.* Although the shares differ in important respects from common shares in the defendant company, we think that the plaintiff must be regarded as a stockholder, and not as a creditor. *Williston v. Michigan Southern & Northern Indiana Railroad*, 13 Allen, 400. *Williams v. Parker*, 136 Mass. 204. *St. John v. Erie Railway*, 22 Wall. 136. *Lockhart v. Van Alstyne*, 31 Mich. 76. *Taft v. Hartford, Providence, & Fishkill Railroad*, 8 R. I. 310. *Boardman v. Lake Shore & Michigan Southern Railway*, 84 N. Y. 157, 178. *Belfast & Moosehead Lake Railroad v. Belfast*, 77 Maine, 445. *Chuffee v. Rutland Railroad*, 55 Vt. 110. *Cook, Stock & Stockholders*, (3d ed.) §§ 267, 271.

The stock was issued under and in accordance with the provisions of St. 1885, c. 849. By § 2 of that act it is expressly provided that the holders of preferred stock "shall be entitled to all the privileges of other members of said corporation, including the right to vote upon such stock, in person or by proxy, at all corporate meetings." Independently of other considerations, this provision plainly puts the preferred shareholders upon the footing of members of the corporation. By § 3 of the act it is provided that "the provisions of law relative to special stock . . . shall not be held to apply in case of stock issued under this act," thus removing the objection which might otherwise be made under *Williams v. Parker*, 136 Mass. 204, that it is the policy of the Commonwealth to regard special stockholders, and, by parity of reasoning, preferred stockholders, as creditors.

It is immaterial how or where the plaintiff obtained his shares. The preference belongs to the stock, and not to the

* The indenture of compromise was executed on July 20, 1885, by and between the creditors of the defendant corporation, the corporation, and Horace H. Mayhew, and provided, in substance, that the creditors were to assign their claims to Mayhew in trust; that he was to convert such claims into bonds and preferred stock of the corporation in certain proportions, which were to be issued by the corporation to him; that the bonds were to be secured by mortgage and pledge of the property of the corporation to the trustee; and that he was to distribute the bonds and stock to the subscribers to the indenture as therein specified.

stockholder. Otherwise the stock would be preferred as long as it was held by a creditor who was a party to the indenture of compromise, and would lose its privilege when it passed into the possession of one who was not a party to that instrument.

The principal question relates to the right of the plaintiff to dividends, and involves, first, the construction of the third section of the act aforesaid, and, secondly, whether this action can be maintained, or, if not, whether there is a remedy in equity.

Section three provides that "The holders of said preferred stock shall be entitled to dividends upon the same annually, out of net profits, in preference and priority to the holders of any other stock of said corporation, to the amount of such rate per cent thereon, not exceeding seven per cent, as may be determined by vote of said corporation prior to issue of the same, which rate per cent of priority shall be expressed in the certificates of said preferred stock, and shall also share *pro rata* with the holders of the common stock in any excess divided in any year above a dividend on the whole stock at said rate per cent; and dividends to the holders of such preferred stock, at the rate per cent fixed upon, shall be paid for each year from the time of its issue, cumulatively, before any dividends shall be paid upon any other stock of said corporation, and, if so voted and expressed in the certificates, may be guaranteed by said corporation." Prior to the issue of said preferred stock the corporation and the directors determined by vote the rate of dividend to be paid, and the form of certificates to be issued. The certificates issued to the plaintiff were in the form thus determined, and so much of them as is now material is as follows: "Said stock is issued under and subject to an act of the General Court of the Commonwealth of Massachusetts, approved June 18, 1885, entitled 'An Act to authorize the Lamson and Goodnow Manufacturing Company to issue preferred stock,' and its holder has all the rights provided for the holders of such preferred stock by this act. The holder of the stock represented by this certificate is entitled to dividends thereon annually out of net profits, in preference and priority to the holders of any stock of said corporation except the preferred stock issued under said act, to the amount of six per cent, which rate per cent was determined by vote of said corporation prior to its original issue; and said holder is

also entitled to share *pro rata* with the holders of the common stock in any excess divided in any year above a dividend on the whole stock of said company at said rate of six per cent. The holder of the stock represented by this certificate is entitled to dividends upon it at six per cent for each year from the time of its issue, cumulatively, before any dividends shall be paid upon any stock of said corporation except the preferred stock issued under said act, which dividends are guaranteed by said company, a vote of said company to that effect having been passed prior to its original issue." It is to be observed that the act only authorizes the payment of dividends on the preferred stock out of net profits, and that to secure their final payment in case there should be no net profits or a deficiency at any time, but should be net profits later, the dividends are made payable cumulatively. The certificates follow the act. And we think that the effect of the guaranty which the act authorized, and which was voted by the company and is contained in the certificates, was not to make dividends of six per cent payable at all events and whether there were net profits or not, but to add to the statutory liability the direct undertaking of the company that the net profits should be devoted first of all, as between the preferred stockholders and the holders of any other stock, common or special, to the payment of preferred dividends. In the strict sense of the word, "guaranty" or "guarantee" applies to an undertaking by another, though it is sometimes used in the sense of "warranty" or "warrant." *Wiley v. Athol*, 150 Mass. 426, 434. To give it in the present case the effect of rendering the company absolutely and at all events liable for the dividends would be inconsistent with the provision authorizing dividends on preferred stock to be made from net profits. It cannot be supposed that the Legislature, having provided for the payment of dividends from net profits, and by implication forbidden their payment from anything else, would in almost the next sentence authorize the company to incur a liability which might compel it to pay dividends though its business was conducted at a loss. A construction which attached such a meaning to the guaranty which the company was authorized to give would nullify the provision in regard to the payment of dividends from net profits. In the case of *Williams v. Parker*, 136 Mass. 204, not only was

there no provision in St. 1855, c. 143, § 1, that the dividends should be payable from net profits, but that statute expressly provided that the company was "to give its guaranty that each share of said stock shall receive semiannual dividends of four dollars on each share," and the guaranty accordingly was held to be an absolute one. That case was much stronger than this. Generally the use of the word "guaranteed," as applied to dividends upon preferred stock, whether in connection with the word "preferred" or alone, has not been held to import an absolute liability. *Williston v. Michigan Southern & Northern Indiana Railroad*, 13 Allen, 400. *Taft v. Hartford, Providence, & Fishkill Railroad*, 8 R. I. 310. *Lockhart v. Van Alstyne*, 31 Mich. 76. *Boardman v. Lake Shore & Michigan Southern Railway*, 84 N. Y. 157. *Miller v. Ratterman*, 47 Ohio St. 141. *Stevens v. South Devon Railway*, 9 Hare, 313. *Henry v. Great Northern Railway*, 1 DeG. & J. 606. *Sturge v. Eastern Union Railway*, 7 DeG., M. & G. 158. *Cook, Stock & Stockholders*, (3d ed.) §§ 267-275. In some instances its use has led to preferred dividends being regarded as cumulative. *Stevens v. South Devon Railway*, *Henry v. Great Northern Railway*, and *Boardman v. Lake Shore & Michigan Southern Railway*, *ubi supra*. But although in the present case that effect cannot be given to it, since it is expressly provided that the dividends shall be cumulative, we think that that fact, in view of the provision already noted, that the dividends are payable from net profits, should not cause the guaranty to be regarded as an absolute one. Moreover, the preferred stockholders are entitled to dividends as dividends, and not as interest, and as members of a corporation, and not as creditors. Thus it is provided that "the holders of said preferred stock shall be entitled to dividends," etc. They are to share with holders of common stock in excess divided above a dividend upon the whole stock at the rate fixed for the preferred stock. "And dividends to the holders of such preferred stock . . . shall be paid . . . cumulatively, before any dividends shall be paid upon any other stock," etc. Though the company was authorized to issue the stock in payment of its indebtedness, there is no provision in the act that those creditors who have accepted the stock in payment of their debts are henceforth to be regarded in any other light

than that of stockholders. The fact that the dividends were payable cumulatively out of net profits, at the rate of six per cent, in preference to any other stock, well may have operated as a sufficient inducement to creditors to exchange their demands against the corporation for preferred stock, especially if the prospects of successful business were good, as it fairly may be assumed that the parties interested supposed them to be. Creditors may also have thought that this was far better than insolvency. Good and sufficient reasons can be found for the action of the creditors in changing their demands against the company for its preferred stock, without construing the guaranty as importing an absolute undertaking on its part to pay dividends at the specified rate. Some of them are stated in the preamble of the indenture of compromise.

Neither do we think that the guaranty can be regarded as an undertaking that whenever there were net profits they should be divided without regard to the circumstances or situation of the company among the preferred stockholders. The act itself does not in terms compel such a division. And we see nothing in it to take the case out of the general rule, that, in the first instance, the decision of the question whether there shall or shall not be dividends lies with the company or its agents. Looking at § 3 in connection with the rest of the act, we think that the reasonable construction of it is, that, if there are net profits which, in the fair judgment of the company or its agents, taking all the circumstances into account, are or should be available for dividends, then the preferred stockholders are entitled to receive dividends on their stock, at the rate fixed by the vote of the company and expressed in the certificates, before any dividends are paid on any other stock, and that if the company has passed any dividends the preferred stockholders are entitled to have them made good to them before any dividends are paid on any other stock. This conclusion derives some support from the concluding sentence of that section, already referred to, that "the provisions of law relative to special stock," upon which corporations are expressly required to pay "a fixed half-yearly sum or dividend," (Pub. Sts. c. 106, § 42, *Williams v. Parker*, 136 Mass. 204,) shall not be held to apply in the case of stock issued under this act.

If under § 6, in connection with Pub. Sta. c. 106, § 60, the officers could be made liable for a dividend which the law compelled them to declare, or for a debt which they could not prevent, (which we do not decide,) then that fact also would furnish an argument against regarding the guaranty as an absolute one. We discover nothing in the way of contemporaneous construction at variance with that which we have adopted.

No dividend having been declared, it follows that this action, which is a suit at law, cannot be maintained. *Williston v. Michigan Southern & Northern Indiana Railroad*, 13 Allen, 400. The remaining question is whether, upon the facts agreed, if applied to proceedings in equity, the plaintiff could have relief. We assume that the directors and manager could be compelled to make dividends out of net profits to the preferred stockholders if it turned out that they were acting unreasonably in refusing to declare them; but we do not think that in this case the plaintiff would be entitled to relief. The capital is seriously impaired. Though the indebtedness was reduced by the compromise, and has been further reduced by payments since, it still amounts to a large sum, and is payable on demand or on short time. The bonds matured in August, 1890. None of them were paid before maturity, and the concern could not have paid any of them without seriously crippling it, or destroying its business. It is true that the assets seem to be largely in excess of the indebtedness, and that it has been held that preferred stockholders are not bound to wait for dividends till the impaired capital has been made good, and the debts have been paid. *Stevens v. South Devon Railway*, 9 Hare, 313. *Belfast & Moosehead Lake Railroad v. Belfast*, 77 Maine, 445. But the valuation put upon the assets appears to be to a considerable extent a book-keeping one; and it is agreed that, if the company should be obliged to dispose of them to pay its debts or to close up its business, they would suffer a very great shrinkage from the valuation put upon them. No dividend has been paid upon the preferred stock, and none upon the common stock, since 1882. It is not contended that there were any net profits prior to January 1, 1886, sufficient to justify a dividend. From January 1, 1886, to July 1, 1893, after deducting all expenses and also current interest on its debt, and allowing for depreciation of

property, the business "resulted in net gains of actual cash value in assets more than in liabilities sufficient in amount to meet the payment of dividends on the preferred stock, at the rate provided for in the certificates, for every year since the time of its issue to the trustee, with interest." But in the year ending July 1, 1894, there were no net profits. During half the time, therefore, from the date of compromise in July, 1885, to July, 1893, there seem to have been no net profits, showing that the business was somewhat precarious in its nature. The controlling purpose of the directors and manager has been to provide for the payment of the debts, and to put the concern in a position strong enough to secure renewals of such of its debts as could not be paid when due. Their discretion, it is agreed, has been honestly exercised to that end, and they have refused to declare dividends, in part because they believed that it would endanger the ability of the company to pay its debts, and in part because they did not deem it proper to declare dividends on account of the impairment of the capital. We do not think that the directors and manager appear so plainly to have acted in disregard of the rights of the preferred stockholders as to justify the interference of a court of equity. The directors and manager were bound to have regard to all of the interests intrusted to them. If one class was to be favored above another, the creditors were to be looked after in preference to the stockholders. It was for the benefit of the stockholders, the preferred as well as the common, that the impaired capital should be made good, and that the business, if possible, should be put on a sound and enduring basis. We cannot say that, if dividends had been paid, the result might not have been to injure the concern, nor that the conduct of the directors and manager has not been on the whole judicious. *Barnard v. Vermont & Massachusetts Railroad*, 7 Allen, 512, 516. *New York, Lake Erie, & Western Railroad v. Nickals*, 119 U. S. 296. *Cook, Stock & Stockholders*, (3d ed.) § 271.

The result is, that, in the opinion of the majority of the court, the judgment must be affirmed, and it is

So ordered.

JOHN H. A. CLARK vs. HIRAM H. JENKINS & another.

Plymouth. October 16, 1894. — November 28, 1894.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

Motion to direct a Verdict — Number of Times that Verdict may be set aside.

The court may set aside a verdict as against the evidence, although a motion to direct a verdict for the defendant has been denied.

In this Commonwealth there is no rule of law limiting the number of times that a judge may set aside a verdict as against the evidence.

TORT, under St. 1887, c. 270, for personal injuries occasioned to the plaintiff while in the defendants' employ.

At the trial in the Superior Court, before *Bishop, J.*, the defendants moved, at the close of the plaintiff's case, that the jury be directed to find a verdict for the defendants, on the ground that there was not sufficient evidence to sustain a verdict for the plaintiff, which motion was denied. At the close of the defendants' case they renewed the motion, which was again denied. The jury found for the plaintiff, and the defendants moved that the verdict be set aside for the reasons that it was against the law, and against the evidence and the weight of the evidence.

At the hearing on this motion the records of the Superior Court in this case were produced by the plaintiff, from which it appeared that the verdict found by the jury in this trial was the third verdict found for the plaintiff in this action, and that the preceding verdicts had been set aside upon like motions. The plaintiff asked the court to rule "that under these circumstances it had no authority to set the verdict aside, either on the ground that it was against the evidence or the weight of evidence, and that it would be an abuse of discretion on the part of the court to set it aside on either of those grounds."

The judge declined to give the ruling requested, and directed that the verdict be set aside upon the ground that it was against the evidence and the weight of the evidence; and the plaintiff alleged exceptions.

W. J. Coughlan, for the plaintiff.

A. Lord, for the defendants, was stopped by the court.

ALLEN, J. The cases cited for the plaintiff show that it is sometimes said to be the duty of the court to direct the jury to return a verdict for the defendant, in cases where the whole evidence is insufficient to support a verdict for the plaintiff.* The rule as declared by the Supreme Court of the United States is, that in such a case "the court is not bound to submit the case to the jury, but may direct a verdict for the defendant." *Randall v. Baltimore & Ohio Railroad*, 109 U. S. 478. *Schofield v. Chicago, Milwaukee, & St. Paul Railway*, 114 U. S. 615. In the present case, the court may have thought it expedient to leave the case to the jury without such direction, in the expectation that they would find for the defendants, and thus save any further question; or for the moment it may have seemed doubtful whether there was not some slight evidence entitling the plaintiff to go to the jury. However this may have been, the plaintiff has not referred us to any case where it has been held that the omission to give such direction, on motion of the defendant, will debar the court from afterwards setting aside a verdict for the plaintiff, as against the evidence. No such limitation of authority is found in Pub. Sts. c. 153, § 6, providing that "the courts may at any time before judgment in a civil action set aside the verdict and order a new trial for any cause for which a new trial may by law be granted." We have no doubt of the legal authority of the court to set aside the verdict, although the defendants' motion to direct the jury to find a verdict for the defendants had been denied.

In this Commonwealth, there is no rule of law limiting the number of times that a judge may set aside a verdict as against the evidence. On the other hand, it has been recognized that in an extraordinary case the court may set aside any number of verdicts that might be returned. *Coffin v. Phenix Ins. Co.* 15 Pick. 291, 295. *Denny v. Williams*, 5 Allen, 1, 5. *Brooks v.*

* The counsel for the plaintiff cited in his brief *Denny v. Williams*, 5 Allen, 1; *Lamb v. Western Railroad*, 7 Allen, 98; *Reed v. Deerfield*, 8 Allen, 522, 524; *Nichols v. Chicago, Rock Island, & Pacific Railway*, 69 Iowa, 154; *Linkauf v. Lombard*, 137 N. Y. 417, 426; *Hemmens v. Nelson*, 138 N. Y. 517; *Schofield v. Chicago, Milwaukee, & St. Paul Railway*, 114 U. S. 615, 619; *Metropolitan Railway v. Jackson*, 3 App. Cas. 193; 11 Am. & Eng. Ency. of Law, 245; 19 Am. & Eng. Ency. of Law, 43, 49, 50, note; *Scrapps v. Reilly*, 38 Mich. 10; *Doane v. Lockwood*, 115 Ill. 490; *Bartelott v. International Bank*, 119 Ill. 259; *Griffin v. Chicago, Rock Island, & Pacific Railway*, 68 Iowa, 638; *Thompson, Trials*, § 2710; *Nickolls v. Popwell*, 80 Ga. 604; Pub. Sts. c. 153, § 6.

Somerville, 106 Mass. 271, 275. See also *Davies v. Roper*, 2 Jur. (N. S.) 167; *State v. Horner*, 86 Mo. 71; *Wolbrecht v. Baumgarten*, 26 Ill. 291. The fact that three successive verdicts for the plaintiff have been returned does not of itself make it the legal duty of the court to allow the last verdict to stand if unsupported by sufficient evidence.

No other reason except those above referred to has been assigned for questioning the action of the court in setting aside the verdict for the plaintiff, and neither of these shows that the court exceeded its legal authority. *Exceptions overruled.*

THEODORE L. MARVEL *vs.* FANNY W. PHILLIPS & another,
executors.

Bristol. October 22, 1894. — November 28, 1894.

Present: FIELD, C. J., ALLEN, KNOWLTON, & LATHROP, JJ.

Contract — Discharge of Obligation by Death — Patent — Trust.

A., having made a certain invention for which he had applied for letters patent, assigned the invention to B., taking from him an agreement in writing, by which B. agreed as follows: "1. To pay all expenses of said applications and of obtaining said letters patent of the United States. 2. To manage the business for the joint benefit of both; to advance all funds requisite, but to look to the business for repayment, but to hold full title for the benefit of both until A. shall join in a change of title, and to use all reasonable efforts to increase and supply the demand for the" invention; "that is, to do all things which a wise and energetic owner of said patents with ample financial ability ought to do. . . . 5. I agree and bind myself and my legal representatives as above, with and to A. and his legal representatives." There was a delay in the granting of the patents, one of them not being granted until about two years after the date of the agreement, and B. died within seven months after the last patent was granted. *Held*, that the obligation of B. under the agreement was discharged by his death; and that the executor of his will could not be compelled to convey the letters patent to a trustee.

APPEAL from a decree of the Probate Court, dismissing a petition for the conveyance, by the executors of the will of William H. Phillips, of certain letters patent to a trustee. The case was heard by *Knowlton*, J., and reserved for the consideration of the full court; such decree to be entered as law and justice might require. The facts appear in the opinion.

J. E. Maynadier & O. R. Mitchell, for the plaintiff.

E. H. Bennett, (*F. S. Hall* with him,) for the defendants.

ALLEN, J. The plaintiff, having invented an improvement in conveyors and an improved elevator, for which he had applied for letters patent, assigned his inventions to Phillips, the defendants' testator, taking from him an agreement in writing, by which Phillips agreed: "1. To pay all expenses of said applications and of obtaining said letters patent of the United States. 2. To manage the business for the joint benefit of both; to advance all funds requisite, but to look to the business for repayment, but to hold full title for the benefit of both until Marvel shall join in a change of title, and to use all reasonable efforts to increase and supply the demand for the Marvel elevator and conveyor; that is, to do all things which a wise and energetic owner of said patents with ample financial ability ought to do." A later provision was as follows: "5. I agree and bind myself and my legal representatives as above, with and to Marvel and his legal representatives."

There was a delay in the granting of the patents, one of them not being granted till about two years after the date of the agreement; and Phillips died within seven months after the granting of the last patent. No claim is made on the ground of any breach of agreement by Phillips during his lifetime; but the plaintiff asks to have an order passed for the conveyance of the letters patent to a trustee, who may then seek to enforce against the executors of Phillips the agreement to advance all requisite funds. The executors, on the other hand, have always been ready and willing to reconvey to the plaintiff any interest they might have in the patents, and have in fact tendered to him such conveyance; but this the plaintiff does not wish to accept, unless the conveyance is made to him as trustee, thus recognizing the existence and continuance of a trust.

Without dwelling upon other objections, we are of opinion that the plaintiff is not entitled to such a conveyance as he seeks, because the obligation of Phillips under the agreement was discharged by his death. The chief undertakings were personal in their character. He was to endeavor to create a profitable business under the patents, and to manage it, to advance funds for the repayment of which he was to look solely to the business,

to use all reasonable efforts to increase and supply the demand for the elevator and conveyor, and to do all things which a wise and energetic owner of said patents with ample financial ability ought to do. This implies personal skill, attention, and ability of a high order. The amount of money required to be advanced is not stated, but obviously it would be considerable. Ample financial ability is called for by the contract. The different parts of the agreement are not separable. Phillips was to advance all funds requisite, but was to look to the business for repayment. Accordingly, it is frankly conceded by the counsel for the plaintiff, that, if the duties of Phillips were of such a character that they did not descend to his executors, his obligation to furnish money would not descend.

A contract to render such services and perform such duties is subject to the implied condition that the party shall be alive and well enough in health to perform it. Death or a disability which renders performance impossible discharges the contract. Neither Phillips nor his estate is bound to furnish a substitute, nor is the plaintiff bound to accept one. There are many cases where this doctrine is illustrated, some of which may be cited. *Stewart v. Loring*, 5 Allen, 306. *Harrison v. Conlan*, 10 Allen, 85. *Wells v. Calnan*, 107 Mass. 514. *Eliot National Bank v. Beal*, 141 Mass. 566, 570, and cases there cited. *Butterfield v. Byron*, 153 Mass. 517. *Spalding v. Rosa*, 71 N. Y. 40. *People v. Globe Ins. Co.* 91 N. Y. 174. *Dickey v. Linscott*, 20 Maine, 453. *Yerrington v. Greene*, 7 R. I. 589. *Shultz v. Johnson*, 5 B. Mon. (Ky.) 497. *Poussard v. Spiers*, 1 Q. B. D. 410. See also Pollock, Con. (Wald's ed.) 368, 373-378.

There is nothing in the terms of this contract to show that, in case of the death of Phillips, the parties intended that his executors should assume to carry on the business. The final provision, which is chiefly relied on, "I agree and bind myself and my legal representatives as above," does not bind his executors to do anything from which he himself was discharged. It does not provide for a substituted performance in case of his death; but if he fails to perform anything covered by his agreement, then the executors are bound, as he is, to make good the loss. He might select such person for executor as he chose. Suppose he should appoint a woman unused to business, and

entirely incompetent to create and carry on such an enterprise as that contemplated; if she is bound to assume the duties which by the contract he undertook, then the plaintiff is bound to accept her in place of Phillips, unless he could succeed in procuring her removal. The result would be, that not only would the estate of Phillips be tied up and exposed to hazard for an indefinite time, but the plaintiff's interests might be sacrificed by reason of Phillips's appointment of an unsuitable executor. It would require explicit words to show that parties entering into a contract like this intended that executors should perform the duties undertaken by Phillips. Even in the case of a partnership, a provision for continuing a partner's interest after his death must be clear and unambiguous. *Bacon v. Pomeroy*, 104 Mass. 577, 585. *Burwell v. Mandeville*, 2 How. 560, 577. *Smith v. Ayer*, 101 U. S. 320, 329, 330. *Kirkman v. Booth*, 11 Beav. 273, 280. Story, Part. (7th ed.) § 319 a.

The plaintiff's petition must be dismissed, but without prejudice to a new bill to compel the conveyance of the patents to the plaintiff, in case the defendants should hereafter refuse to make such conveyance. *So ordered.*

COMMONWEALTH vs. WILLIAM MARTIN.

Essex. November 7, 1894. — November 28, 1894.

Present: FIELD, C. J., ALLEN, KNOWLTON, & BARKER, JJ.

Intoxicating Liquors — Evidence sufficient to justify a Verdict of Guilty.

On a complaint for keeping intoxicating liquors with intent unlawfully to sell the same, the fact that there were in the defendant's carpenter shop certain bottles of lager beer, both full and empty, a jug full of whiskey and another only partly full, a tunnel, a corkscrew, and three bottles all smelling of whiskey, together with the way in which the articles were placed in the shop, is sufficient to justify a verdict of guilty.

COMPLAINT, for unlawfully keeping for sale intoxicating liquors with intent to sell the same unlawfully, on January 14, 1894.

At the trial in the Superior Court, before *Lilley*, J., the jury returned a verdict of guilty; and the defendant alleged exceptions.

D. W. Quill, for the defendant.

W. H. Moody, District Attorney, for the Commonwealth.

BARKER, J. The case needs no discussion. The fact that there were in the defendant's carpenter shop thirty-seven bottles of lager beer, seventy-three empty lager beer bottles, a four-gallon jug full of whiskey, another four-gallon jug containing about a quart of the same liquor, a tunnel, a corkscrew, and three bottles known as "smugglers" all smelling of whiskey, with the way in which these articles were placed in the shop, justified the verdict of guilty.*

Exceptions overruled.

COMMONWEALTH vs. WILLIAM P. WHITE.

Essex. November 7, 1894. — November 28, 1894.

Present: **FIELD, C. J., ALLEN, KNOWLTON, & BARKER, JJ.**

Letters as Evidence in a Criminal Case.

If, at the trial of an indictment for threatening to accuse a person of crime with the intent to extort money, letters which were written more than six months before the acts which were the subject of the indictment, and which relate to other persons and have no tendency to prove a criminal intent, are admitted in evidence, a new trial will be granted, although the other evidence may have been sufficient to warrant the conviction of the defendant.

INDICTMENT, in two counts, charging the defendant with unlawfully and maliciously, on September 14 and 19, 1893, threat-

* The thirty-seven bottles of lager beer were found in a dry-goods box and in a leather bag, those in the dry-goods box being in straw. The four-gallon jug which was full of whiskey was sealed with sealing wax, and stamped upon the sealing wax was the name "Munroe & Co., 72 Broad St., Boston"; the partly empty jug was under a bench, covered with paper, and near the jugs were two tags, on one side of which was written the defendant's name, and on the other side was printed "Munroe & Co., 72 Broad St., Boston." The tunnel, corkscrew, and three bottles known as "smugglers" were found in various places in the room.

ening one Playdon and one Taylor with the crime of having in their possession with intent to sell the same milk not of good standard quality, with intent to extort money from them.

At the trial in the Superior Court, before *Lilley, J.*, it appeared that the defendant was duly appointed milk inspector of the city of Lawrence for the year 1893, and there was evidence to sustain the allegations of the indictment, which evidence consisted of alleged conversations between the defendant and Playdon and his two sons, and between the defendant and Taylor in the presence of Taylor's son.

The government offered in evidence two letters, one from B. F. Davenport, a chemist, to the defendant, which was dated Boston, February 20, 1893, and was as follows:

"Your milk samples were not received by me until this morning. We close Saturday at 3 P. M., or as soon thereafter as we can finish the particular work in hand. Hence I cannot mail you my report till the next morning. I shall drop the express a note to call for your return empty cans and box.

"As you see by my report, two of your samples were all right, and the other two, although I have not any doubt that they were watered a little, yet they were so much above twelve per cent solids that I should advise you not to enter them as your first case in court, but with the advice and consent of your mayor to put them on probation upon their payment of all your costs. I accordingly send you bills made out for each of them."

The other letter was from the defendant to Davenport, dated Lawrence, March 21, 1893, and was as follows:

"Enclosed find a sample of Oleo, which I wish you to analyze and report as soon as possible, belonging to one J. J. Caveney.

"In regard to these two first samples (of Feb. 20) of milk, Mayor (Alvin) Mack says it would not be advisable to ask those men to pay the charges, and he desires to know if you will not call those four samples ten dollars, and let your bill go in the first of next month.

"(Paid ten dollars April 13.)"

The defendant objected to the admission of the letters, neither of which was referred to in any of the alleged conversations. The judge admitted the letters in evidence only for the purpose of showing the intent with which the defendant made the alleged threats.

The jury returned a verdict of guilty ; and the defendant alleged exceptions.

H. P. Moulton, for the defendant.

W. H. Moody, District Attorney, for the Commonwealth.

ALLEN, J. We cannot see that the two letters had any legitimate tendency to prove a criminal intent on the part of the defendant in the acts which were the subject of the indictment. They were written more than six months before, and related to other persons, and do not show any purpose to collect black-mail of dealers in milk. Since an objection was expressly taken to the admission of this evidence, and since it was admitted as having some tendency to show a criminal intent, and since we are unable to see that it had any such tendency, we feel constrained to grant a new trial, although the other evidence may have been sufficient to warrant the conviction. *Commonwealth v. Bosworth*, 22 Pick. 397, 400. *Commonwealth v. Keenan*, 152 Mass. 9. *Maguire v. Middlesex Railroad*, 115 Mass. 239.

Exceptions sustained.

GEORGE E. SLEE vs. CITY OF LAWRENCE.

Essex. November 8, 1894. — November 28, 1894.

Present: FIELD, C. J., ALLEN, KNOWLTON, & BARKER, JJ.

Personal Injuries — Defective Highway — Due Care.

A man sixty years old was walking with a companion along the sidewalk of a street in a city in the evening, and, there being a crowd in front of him, started with his companion to cross the street, though not at a regular crossing. As he stepped off the curbstone his foot caught on a pile of rails, which had been placed in the gutter next to the curbstone by a street railway company, and he fell over them and was injured. He did not look to see if there was anything before him, and he did not see the rails until he fell. The rails could not be seen easily, the branches of trees cutting off an electric light which hung not very far away. *Held*, in an action against the city for his injury, that the question whether he was in the exercise of due care was properly left to the jury.

TORT, for personal injuries occasioned to the plaintiff by an alleged defect in Union Street in the defendant city. Trial in

the Superior Court, before *Hammond*, J., who allowed a bill of exceptions, in substance as follows.

The accident happened on July 10, 1893. Union Street runs north and south across the Merrimac River, and Essex Street runs from Union Street at right angles, west. Both streets are paved and have sidewalks upon both sides, and are principal streets of Lawrence. A proper flagstone crossing level with the street is laid across Union Street in continuation of the north sidewalk of Essex Street. There is no street crossing over Union Street in continuation of the south sidewalk of Essex Street.

The Lowell, Lawrence, and Haverhill Electric Railway comes down Essex Street, and, turning into Union Street, runs south five or six feet from the curbstone of the east sidewalk of Union Street. There is an arc light, the post of which stands at the point where the curbstone of the north sidewalk of Essex Street meets the curbstone of the west sidewalk of Union Street. The light hangs diagonally from this post into the street. There is a row of maple trees on each side of Union Street, standing in the line of the curbstone.

During May and the early part of June, 1893, the railway corporation had been distributing along its routes in Methuen, Lawrence, Andover, and North Andover, new rails for rebuilding its tracks. These rails were about thirty feet long, eight inches high, and four inches wide. Four of these rails had been piled in the gutter next to the curbstone of the east sidewalk of Union Street, between and resting against the trunks of two of the trees counting from Essex Street, and from fifty to seventy-five feet south of that street.

The plaintiff, who was about sixty years of age, had been to South Lawrence, and at a little past ten o'clock in the evening came north by Union Street on the east sidewalk to the point where this pile of rails lay. There were some people upon the sidewalk, and he started to leave that sidewalk at a point from fifty to seventy-five feet south from Essex Street, and cross to the end of the south sidewalk on Essex Street, at an angle. On leaving the sidewalk, he stumbled over the pile of rails, and received the injuries complained of.

The plaintiff testified that he found the crowd on the east side of Union Street to be very great, and there did not seem

to be many over on the other side, and he proposed to a friend who was with him that they had better go across there, and he stepped on the street and off the curb, perhaps a step and a half, when he caught his foot on a pile of rails and fell over them ; and that, as he recovered himself, he found that the obstacle which threw him over was the rails which the street railway company had placed there.

On cross-examination, he testified that he did not see the rails until he fell ; that he did not see anything at all ; that he put his left foot down first over the curb, and his right foot caught on the rails, that he did not think of looking, but was going across the road, thinking it was perfectly clear ; and that he did not look at all to see what was before him, because he did not think there was anything.

It was in dispute whether the electric light shone upon the rails so that they were plainly visible, or whether it was dark at that point in consequence of the shade of the trees. The only witnesses present at the accident who testified on this point were the plaintiff and one Addison.

Addison, who was with the plaintiff when he fell, testified that the rails were not to be seen by a person walking along there, because it was too dark ; that one could see nothing as he walked along ; that the branches of the trees overshadowed the place ; that he had difficulty in seeing the rails when he turned back to look at them, and had hard work to find them ; and that he could not see his way, nor what he was stepping into.

There was no other evidence except what is above stated upon the question of the plaintiff's care.

At the close of all the evidence, the defendant asked the judge to rule that, upon this evidence, the plaintiff had not sustained the burden of proving that he was in the exercise of due care, and was not entitled to go to the jury. The judge refused so to rule ; and the defendant excepted.

The jury returned a verdict for the plaintiff ; and the defendant alleged exceptions.

C. U. Bell, for the defendant.

C. A. De Courcy, for the plaintiff.

ALLEN, J. The question of the plaintiff's due care was properly left for the jury to determine. He had a right to cross the

street at the place where he attempted to do so. Indeed, if he had kept on till he got to Essex Street, there was no crossing of flagstones even there on the south side of that street. There was evidence tending to show that the place where he tried to cross was dark, so that the rails could not easily be seen, the branches of trees cutting off the electric light which hung not very far away. There seems to have been nothing uncommon in what the plaintiff did. He was walking along on the sidewalk with a companion, and, there being a crowd in front of him, they both set out to cross the street. It was for the jury to say whether he was in the exercise of due care. *Fuller v. Hyde Park*, ante, 51. *Woodman v. Metropolitan Railroad*, 149 Mass. 335. *Smith v. Wildes*, 143 Mass. 556, 559.

Exceptions overruled.

ELIZABETH BRADY, administratrix, vs. OLD COLONY RAILROAD COMPANY.

Norfolk. November 19, 20, 1894. — November 28, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Loss of Life — Railroad — New Trial — Negligence — Law and Fact.

After a verdict for the defendant a new trial of an action against a railroad corporation, for causing the death of the plaintiff's intestate, cannot be granted, unless this court can see that the plaintiff sustained the burden of proof resting upon him to show a want of due care on the part of the defendant, by evidence which the judge, who tried the case without a jury and found for the defendant, was legally bound to accept as conclusive.

A., who was a passenger on a railroad train, was taken ill during his journey, and received some attention from the train hands. When the train reached the station which was the end of its route, the engine stopped at the water standard, which was at the north end of the station platform, leaving the cars alongside of the platform, and all the passengers alighted. The train stopped about two minutes, and then went on to the north for a short distance in order to be switched back upon another track. Nobody saw A. leave the car, and the next that was seen of him he was lying beside the track about thirty-five or forty feet north of the water standard, and some one was then assisting him to his feet. He was much injured, and died about six hours later. His administrator brought an action against the railroad corporation for causing his death; and the judge, who tried the case without a jury, found for the defendant. *Held*, that it could not be said, as matter of law, that the finding was wrong.

TORT, by the administratrix of the estate of John Brady, for causing his death. Trial in the Superior Court, without a jury, before *Braley*, J., who allowed a bill of exceptions, in substance as follows.

There was evidence tending to show that Brady, the plaintiff's intestate, lived in Stoughton; and that, on the day prior to the accident, he had been to Campello, a station near Brockton, for the purpose of obtaining work, and had obtained employment there.

Upon the morning of December 10, 1892, Brady took a train on the defendant's railroad at Stoughton. He entered the car next the engine, which had smoking and baggage compartments, the smoking compartment being next the engine. Soon after leaving the station at Stoughton, Brady, who had been standing in the baggage compartment, fell to the floor of the car. He was picked up by the baggage-master and put in a chair by the open door of the baggage compartment. He remarked that it was cold. The baggage-master shut the door, and assisted him into the smoking compartment of the car by putting his hands under Brady's arms. He seemed unfit to walk, and his feet dragged. In the smoking compartment he was placed in the corner of a seat next the window, leaning against the window, and two or three times during the run of the train the baggage-master and conductor went and spoke to him, between Stoughton and Campello, leaning over him as they did so. A passenger on the train from Stoughton to Montello, who sat near him on the opposite side of the aisle, noticed that he turned his head slightly to the window, and then turned it back to a forward position, but noticed no other movement. The same passenger, after the train reached Campello, went into the seat behind Brady, and, leaning forward, noticed that his eyes seemed glassy.

When the train reached Montello station the engine stopped at the water standard to take water, and all the passengers alighted. The platform at that station does not extend north of the water standard, and to the north there is only the ordinary gravel of a railroad road-bed. The only means provided by the defendant for passengers to leave its premises at Montello was to go south of the station to the street which crosses

the track near that point, or to go through a gap in a fence west of the station. All the passengers who left the train at Montello on the morning of the accident walked south and left the station premises by one or the other of the two ways above described.

The train stopped at Montello station about two minutes, and then started north and ran up under a bridge for the purpose of running down on another track to the eastward.

A switchman in the employ of the defendant testified that he went from the tank-house after the train, and got upon the rear platform of the rear car with the conductor of the train at Montello station, and rode upon it up to the bridge, and then alighted and walked back; that he then first saw Brady lying beside the north-bound track about thirty-five to forty feet north of the water standard; and that when he saw him some one was assisting him to his feet. No other train passed up the north-bound track after the Stoughton train before Brady was picked up.

It was further in evidence that Brady, when picked up beside the track in the place above described, had his foot crushed and head bloody; that the injury inflicted was adequate to cause death; and that death did ensue within about six hours.

The trains upon the defendant railroad run upon the left-hand track. At Montello station, from a position at a point thirty-five to forty feet north of the water standard, there is no obstruction to prevent a person looking north or south along the tracks, and nothing to prevent one there seeing an approaching train.

This was all the evidence introduced by the plaintiff bearing upon the question of liability.

The defendant offered no evidence, and asked the judge to rule that the plaintiff could not recover. The judge found as follows: "Upon this testimony I must find that there has been no unfitness or gross negligence or carelessness shown on the part of the defendant or its servants or agents while carrying the deceased as a passenger from the place where he got in to the place of his destination. I find no proof from which I can draw the inference that there has been any carelessness on the part of the defendant corporation or its servants." The plaintiff alleged exceptions.

E. F. Leonard, for the plaintiff.

J. H. Benton, Jr., (*C. F. Choate, Jr.* with him,) for the defendant.

ALLEN, J. This case was tried without a jury, and the judge found for the defendant. A new trial cannot be granted unless we can see that the plaintiff sustained the burden of proof resting upon him to show a want of due care on the part of the defendant, by evidence which the judge was legally bound to accept as conclusive. Where the verdict or finding is against the party having the burden of proof, there is always a difficulty in saying that, as matter of law, it should have been the other way. In this case, it would seem from the bill of exceptions that at the Montello station the engine stopped at the water standard, which would leave the cars alongside of the station platform; and it is stated that all the passengers left the train. The train stopped about two minutes, and then went on to the north for a short distance in order to be switched back upon another track, Montello being the end of its route. Nobody appears to have seen the plaintiff's intestate leave the car, and, so far as is disclosed the next that was seen of him was, that shortly afterwards a switchman saw him lying beside the track about thirty-five or forty feet north of the north end of the platform; and some one who was not a witness was then assisting him to his feet. He was much injured, and died about six hours later. The circumstances of his receiving the injury were not more particularly disclosed, and perhaps could not be. The negligence now relied on is, that the passenger during his journey was obviously sick, and that the defendant ought therefore to have looked after him, to have helped him out of the car, and to have seen that he reached a place of safety, and that it failed to do so. This argument could be urged with force before the tribunal having to pass upon the question of negligence. We cannot know exactly how the facts appeared to the mind of the judge, or say, as matter of law, that his finding was wrong.

Exceptions overruled.

CHARLES A. SANBORN vs. GEORGE W. GALE.

Middlesex. November 23, 1894. — November 28, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Alienation of Wife's Affection — Statute of Limitations — Fraudulent Concealment of Cause of Action — Evidence — Confession by Wife to Husband.

▲ husband's cause of action for the alienation of his wife's affection accrues at the time when he discovers her in the act of adultery; and an action therefor against her paramour, brought more than six years after such discovery, is barred by the statute of limitations, Pub. Sts. c. 197, § 1, cl. 4.

The fact that a wife, although detected by her husband in the act of adultery, denied, by agreement with her paramour, their guilty relations until the expiration of twelve years, when she confessed them, is not a fraudulent concealment of the husband's cause of action for the alienation of his wife's affection, within Pub. Sts. c. 197, § 14.

▲ cause of action cannot be said to be concealed from one who has a personal knowledge of the facts which create it, although he may have no other means of establishing his case than by his own testimony.

▲ confession in writing by a wife to her husband, shown by her to no other person, of her guilty relations with another, is not competent evidence against the latter, in an action by the husband for the alienation of his wife's affection.

TORT, for the alleged alienation by the defendant of the affection of the plaintiff's wife. Writ dated January 23, 1893. Answer: 1. A general denial. 2. The statute of limitations. Trial in the Superior Court, before *Mason*, C. J., who allowed a bill of exceptions, in substance as follows.

The plaintiff offered to prove that, in the latter part of the year 1876, he moved into a house owned by the defendant in Cambridge, where he remained until January 1, 1879, as tenant at will, occupying the house with his wife; that the defendant during that period called at the house with great frequency, and became intimately acquainted with the plaintiff's wife, the plaintiff being sufficiently aware of this to have suspicion that the acquaintance was becoming dangerous to his domestic peace, but not aware that the affection of the wife had been in fact alienated; that, in consequence of these suspicions, on January 1, 1879, the plaintiff removed with his wife to another house, where the defendant had no occasion to go for any purpose whatever, but he persisted in coming there with frequency,

of which the plaintiff became aware, and on May 5, 1880, detected his wife and the defendant in the house in the act of adultery; that the plaintiff and his wife continued to live together after this in the same house, but occupying separate rooms, until May 11, 1892, when his wife died, after an illness lasting about one year; that on May 1, 1892, his wife made and signed a written confession to the plaintiff of her relations with the defendant from January 1, 1876, to May 5, 1880, stating therein, among other things, that the defendant, on the occasion above mentioned, May 5, 1880, induced her to agree with him utterly to deny to the plaintiff that she had been guilty, as she had in fact been with the defendant during the period above mentioned; and that the wife did in fact deny to the plaintiff her guilt and relations with the defendant until the time of her confession; and the plaintiff offered to show evidence of injury and loss of his wife's society caused by the alienation of her affection. The plaintiff admitted that the confession had never been shown by the wife to any one but himself.

Upon the foregoing offer of proof, the plaintiff asked the judge to rule as follows: "1. The cause of action did not accrue until the date of the confession. 2. The written confession was itself competent evidence of the fact of a conspiracy between the wife and the defendant to conceal from the plaintiff any knowledge of the cause of action."

The judge refused to rule as requested; ruled that, upon the offer of proof, the action could not be maintained; and directed the jury to return a verdict for the defendant. The plaintiff alleged exceptions.

J. W. Pickering, for the plaintiff.

G. F. Piper, for the defendant.

ALLEN, J. The plaintiff's cause of action was complete at the time when he discovered his wife in the act of adultery with the defendant; and, as this was more than six years before he brought suit, the action was barred by the statute of limitations, Pub. Sts. c. 197, § 1, cl. 4, unless saved by the provisions of § 14 as to a fraudulent concealment by the defendant of the cause of action. The wife's confession in 1892 did not disclose any subsequent adultery, or any cause of action accruing at a later date; and if it would show that she, through the procure-

ment of the defendant, had agreed to deny the facts, that is not the same thing as fraudulently concealing the cause of action. A cause of action cannot be said to be concealed from one who has a personal knowledge of the facts which create it, although he may have no other means of establishing his case than by his own testimony. See *Nudd v. Hamblin*, 8 Allen, 130; *Jackson v. Buchanan*, 59 Ind. 390.

Moreover, the confession was not competent against the defendant, because the plaintiff could not be allowed to testify as to a private conversation with his wife; Pub. Sts. c. 169, § 18, cl. 1; and also because the defendant would not be bound, and could not be affected, by such a confession made in his absence. *Pond v. Pond*, 132 Mass. 219, 223. *Exceptions overruled.*

ANNA D. VAN HOUTEN vs. ASA P. MORSE

Suffolk. January 19, 1894. — November 30, 1894.

Present: FIELD, C. J., ALLEN, MORTON, & BARKER, JJ.

Breach of Promise of Marriage — Fraudulent Concealment — Instructions — Evidence.

It is not the duty of a person, before making or accepting an offer of marriage, to communicate all the previous circumstances of his or her life; and the parties to the contract will be bound, if they become engaged to marry without making any investigation, and without receiving any assurances or representations which lead to the engagement, even though matters relating to either party are discovered subsequently which, if known at the time, would have prevented the engagement, unless they are such as give a right to the other party to terminate the contract upon their discovery.

If a man and a woman enter into an engagement to marry, the facts that she had some negro blood in her veins, or that her motives were mercenary, or that there was a want of affection on her part, or an incompatibility, resulting from disparity of age, difference in character and disposition, and other causes, will not justify him, as matter of law, in breaking the contract.

If a woman, who contemplates entering into an engagement to marry, undertakes, without inquiry from the man, to state facts relating to any circumstances in her history or life, or to her parentage or family, or to her former or present position, which are material, she is bound not only to state truly the facts which she narrates, but also not to suppress or conceal any facts which are necessary to a correct understanding on his part of the facts which she states; and, if she

wilfully conceals and suppresses such facts, and thereby leads him to believe that the matters to which such statements relate are different from what they actually are, she will be guilty of a fraudulent concealment, which will avoid a contract to marry subsequently made.

At the trial of an action for breach of a promise of marriage, the defendant requested the judge to rule as follows: "If mutual promises to marry were made, and the defendant was influenced to do so by the fraud or deception of the plaintiff as to her life, lineage, character, traits of character, or property, or former condition in life, his promise does not bind him." The judge said: "That I should give with the qualification which I have made generally upon the subject. I think there is nothing objectionable in that." He had previously told the jury that it was not the duty of a party, before making or accepting an offer of marriage, to communicate all the previous circumstances of his or her life; and that a party would not have the right to terminate a contract to marry on the ground of fraud upon subsequently discovering matters which, if seasonably known, might have prevented the engagement, though not sufficient to justify a party in breaking it off. *Held*, that, as thus qualified, the instruction was correct, and the defendant had no ground of exception.

In an action for breach of a promise of marriage, there was evidence tending to show that the plaintiff had negro blood in her veins; and that, in making statements to the defendant regarding her parentage, she suppressed that fact. The plaintiff was allowed to introduce in evidence photographs of her parents and sister, and of the latter's children, which she testified were correct likenesses, and had been shown by her to the defendant. *Held*, that no error appeared.

CONTRACT, for breach of promise of marriage. At the trial in this court, before *Barker, J.*, the jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion.

L. W. Howes, (*E. Sullivan* with him,) for the defendant.

R. M. Morse & *L. M. Child*, for the plaintiff.

MORTON, J. The defence principally relied on in this case is that the promise which the jury have found was made was induced by fraudulent conduct and representations and concealments on the part of the plaintiff with reference to various matters relating to her past life, to her parentage and family, and to her position and circumstances. The defendant contends that the instructions of the court as to what constituted fraudulent concealment were not sufficient, and that certain requests which he made should have been given.

The jury were correctly instructed that it was not the duty of a party, before making or accepting an offer of marriage, to communicate all the previous circumstances of his or her life; and that the parties would be bound, if they became engaged without making any investigations, and without receiving any assur-

ances or representations which led to the engagement, even though matters were discovered subsequently which, if known at the time, would have prevented the engagement, unless they were such as gave a right to the other party to terminate the contract upon their discovery. Whether the only matters which would give the defendant such a right were those relating to the chastity of the plaintiff, we have no need now to consider. No question was made by him as to the plaintiff's chastity; and the fact, if it was a fact, that the plaintiff had some negro blood in her veins, or that her motives were mercenary, or that there was a want of affection on her part, or that there was an incompatibility resulting from disparity of age, difference in character and disposition, and other causes, which, apart from fraud, were the things relied on by the defendant, would not justify him as matter of law in breaking the contract. *Reynolds v. Reynolds*, 3 Allen, 605. *Coolidge v. Neat*, 129 Mass. 146. *Gring v. Lerch*, 112 Penn. St. 244. *Berry v. Bakeman*, 44 Maine, 164. *Leeds v. Cook*, 4 Esp. 256. *Baker v. Cartwright*, 10 C. B. (N. S.) 124. *Beachey v. Brown*, El. Bl. & El. 796. *Young v. Murphy*, 3 Bing. N. C. 54. *Bench v. Merrick*, 1 C. & K. 463. See also 2 Am. & Eng. Encyc. of Law, 525, 526, for collection of cases. But in respect to what would, in view of the circumstances of this case, be such concealment on the part of the plaintiff as to constitute fraud, we think that the instructions hardly went far enough, or at least that it is possible that the jury may not have understood them as they were perhaps intended by the court to be understood. The jury were instructed that if the engagement was brought about, in whole or in part, by false representations, by concealments upon matters which were inquired about, or which the party had by universal consent the right to know, then the contract could not be enforced. And later they were told that the defendant was not bound if the contract was procured by deception or by fraud, or by concealment which was fraud, but that there was no fraudulent concealment by simply not communicating information; that a promise would be valid, though made in complete ignorance of the antecedents of the parties, but that there was a different doctrine where matters were inquired about; and that, if either party made inquiries of the other

with reference to family, position, or circumstances in the life or experience of the other, then, if wilful false statements were made with reference to any of those things which might fairly be considered as entering into the judgment of either party as to whether that party would or would not enter into a contract of marriage, then there would be a false representation. "That is," the court continued, "a statement which the party knows is false, or makes as true of his or her own knowledge, when it is in fact untrue, and without knowing that it is true, or if there is concealment of any such particular which is inquired about, those circumstances will be sufficient to make void a contract entered into in consequence and relying upon them, unless they are of such a nature that no man would be justified in the exercise of any reasonable care in relying upon these statements." These instructions might, and probably would, lead the jury to infer that concealment on the part of the plaintiff would not constitute fraud, except as to matters that were inquired about by the defendant.

But we think that if the plaintiff undertook, without inquiry from the defendant, to state facts relating to any circumstances in her history or life, or to her parentage or family, or to her former or present position, which were material, she was bound not only to state truly the facts which she narrated, but she was also bound not to suppress or conceal any facts which were necessary to a correct understanding on the part of the defendant of the facts which she stated; and if she wilfully concealed and suppressed such facts, and thereby led the defendant to believe that the matters to which such statements related were different from what they actually were, she would be guilty of a fraudulent concealment. *Kidney v. Stoddard*, 7 Met. 252. *Short v. Currier*, 153 Mass. 182. *Burns v. Dockray*, 156 Mass. 135, 137. *Prentiss v. Russ*, 16 Maine, 80. *Atwood v. Chapman*, 68 Maine, 38, 40, 41. *Potts v. Chapin*, 133 Mass. 276. *Clark v. Baird*, 5 Seld. 183. *Brown v. Montgomery*, 20 N. Y. 287. *Devoe v. Brandt*, 53 N. Y. 462. *Hill v. Gray*, 1 Stark. 434. *Stevens v. Adamson*, 2 Stark. 422. *Arkwright v. Newbold*, 17 Ch. D. 301, 317, 318. *Aortson v. Ridgway*, 18 Ill. 23. Add. Torts, (Wood's ed.) 1205.

Mere silence on the part of the plaintiff, without inquiry by

the defendant, though resulting in the concealment of matters which would have prevented the engagement if known, would not constitute fraud on her part. *Potts v. Chapin, ubi supra.* But a partial and fragmentary disclosure, accompanied by the wilful concealment of material and qualifying facts, would be as much of a fraud as actual misrepresentation, and in effect would be misrepresentation. *Arkwright v. Newbold, ubi supra.*

There was evidence that the plaintiff represented to the defendant before the engagement that she had been previously married, and had lived with her husband in Spokane and other places five or six years, and that a few weeks before she left Spokane for Boston she had obtained a divorce from him on account of his bad conduct and cruelty to her. So far as appears from the exceptions, that was all that the plaintiff told the defendant about the divorce before the engagement. But there was testimony tending to show that, at the same time that she procured a divorce from her husband, he procured one from her; and that the cross-bill filed by him in answer to her complaint, and on which his divorce was granted, charged her with being a woman of violent and ungovernable temper, and of jealous, revengeful, and vicious disposition, and with having, within two weeks after their marriage, commenced a systematic course of violent, abusive, and cruel conduct towards him, which finally broke down his health, and compelled him to leave her. It also charged her with assaulting him with a carving-knife, and with using profane epithets in regard to himself, his relatives and friends, and alleged numerous specific acts of violence and passion.

We think that the divorce which her husband obtained from the plaintiff and the charges contained in the cross-bill were material facts, and that if the plaintiff knew them when she told the defendant that she had obtained a divorce from her husband for his cruelty, and wilfully suppressed them, she was guilty of a fraudulent concealment and misrepresentation. To say that she had obtained a divorce from her husband for his cruelty, and omit all reference to his divorce and the grounds on which he obtained it, was to state the matter in such a way as to convey a different impression from that which would have been conveyed if all the facts had

been stated, and was misleading. Though it does not appear very clearly from the exceptions whether she did or did not know of the divorce which her husband had obtained from her, and of the charges which he made in his cross bill, it is fairly to be inferred that she was not ignorant either of the divorce or of the charges. There was testimony tending to show that, when the defendant informed her of them, she did not express ignorance of them, but said that they were not true, and the trial seems to have proceeded on the assumption that she knew of them. Moreover, though possible, it is hardly probable that she was unacquainted with the fact that he had obtained a divorce, or with the grounds on which he got it.

So with regard to her parentage and family. She was under no obligation to tell the defendant about them in the absence of inquiry by him. But if she voluntarily undertook to make any statements concerning them, she was bound not only to state truly what she told, but also not to suppress or conceal facts which would materially qualify those which she stated. If, for instance, as the evidence tended to show, she told the defendant that her father and mother were both of the best white families in Charleston, South Carolina; that her father was a distinguished lawyer; that her mother was equally high bred; and that after his death her mother married a man by the name of Smith, with which marriage her mother's folks were dissatisfied, and that on that account the family moved to California;—but if she suppressed the facts that Smith was a colored barber and an octoroon and her reputed father, and that her mother had negro blood in her veins, and was about one eighth negro, the impression as to the standing of herself and family, and the credibility of her statement respecting her parentage, would or might be quite different from that which would be likely to be the case if she had told the whole truth. These facts, if they were facts, were necessary to a correct understanding of the real state of the circumstances of her family and of her previous history, and were or might be found to be material; and a wilful suppression of them on her part, in view of what there was evidence that she told, would constitute, or might be found to constitute, a fraud upon the defendant. *Wharton v. Lewis*, 1 C. & P. 529.

The defendant's requests did not state the law with entire correctness, and did not direct the attention of the court particularly to the effect of a suppression by the plaintiff of facts which would materially modify those which she voluntarily told the defendant respecting the divorce and her parentage and family.* They did, however, call for instructions as to what would constitute fraudulent concealment in respect to those matters, and it is evident from the charge that the court understood them to do so. In giving its instructions, the court stated the law in reference to things that were inquired about in such a manner that the jury might infer that as to matters not inquired about the suppression of material facts would not constitute fraudulent concealment. As to an important phase of the case this was erroneous, and the jury may have been misled by it; and though the defendant did not call the atten-

* The requests for rulings set out in the bill of exceptions were as follows :

"1. The increased happiness of both parties is, or should be, the only object of marriage; hence mutual promises, based upon genuine mutual affection of the parties, constitute a valid contract to marry.

"2. If the requisite affection was wanting when the promise was made or accepted by one party, such promise was a fraud and deception, and would not bind the other party. In such case there is no good consideration.

"3. If, after a valid contract to marry has been made, the mutual affection necessary to sustain the mutual promises ceases, the consideration fails, and the promises are no longer binding.

"4. If mutual promises to marry were made, and the defendant was influenced to do so by the fraud or deception of the plaintiff as to her life, lineage, character, traits of character, or property, or former condition in life, his promise does not bind him. . . .

"6. If the jury are satisfied that there were mutual promises of marriage between the parties, and that the plaintiff's only or chief object and reason for making the engagement was to profit by the defendant's property, that would be such a deception and fraud upon him as to vitiate and nullify the contract.

"Inasmuch as the parties are now witnesses, it must be shown that the man charged made an express promise to marry the woman, or he cannot be held liable. . . .

"15. If the jury find that the parties made a mutual promise of marriage, and also find that, on account of the disparity in the ages of the parties, incongruity of their dispositions, traits of character, want of affection for each other, or other causes, that a marriage between them would be unsuitable and result in the unhappiness of both, only nominal damages should be allowed for the breach of the promise."

tion of the court to that aspect of the case any more than to what would constitute fraudulent concealment, in case inquiry was made, we think that the whole matter was fairly within the scope of his requests, and that he well might assume that the instructions as given stated, in the opinion of the court, the rules of law properly applicable to it. *Cork v. Blossom, ante*, 330. The court are not unanimous in their view of the questions presented by the bill of exceptions, or in their construction of the judge's charge, but there is no difference of opinion with regard to the principles of law to be applied to the case.

Among other rulings which the defendant requested was the following: "If mutual promises to marry were made, and the defendant was influenced to do so by the fraud or deception of the plaintiff as to her life, lineage, character, traits of character, or property, or former condition in life, his promise does not bind him." In reference to this the court said: "That I should give with the qualification which I have made generally upon the subject. I think there is nothing objectionable in that." We understand that by "the qualification" referred to was meant what the court had said previously in regard to its not being the duty of a party, before making or accepting an offer of marriage, to communicate all the previous circumstances of his or her life, and that a party would not have the right to terminate a contract to marry on the ground of fraud, upon subsequently discovering matters which, if seasonably known, might have prevented the engagement, though not sufficient to justify a party in breaking it off. As thus qualified, the instruction was correct, and the defendant had no proper ground of exception. But we do not think that it meets the objections of the defendant to the sufficiency of the charge in regard to what constituted fraudulent concealment.

The exceptions state that "the jury were instructed at length upon the law applicable to actions for breach of promise of marriage, to which instructions no objection was made, except as appears by the bill of exceptions." We do not understand from this that any instructions on the matter of fraud which were deemed material upon any of the questions raised by the defendant are omitted from the bill of exceptions, but we infer that all of the instructions pertinent to the requests and

contentions of the defendant on that subject are included in the exceptions.

We discover no error in the instructions, or rulings or refusals to rule, or in the admission of evidence, or in the conduct of the trial, except as above stated.

We cannot say that the photographs did not tend to support the statements of the plaintiff in regard to her family, or that they were improperly admitted.* Whether they were sufficiently verified was for the court, and is not a matter of exception. *Blair v. Pelham*, 118 Mass. 420. *Commonwealth v. Morgan*, 159 Mass. 375. *Exceptions sustained.*

LYMAN G. FALES vs. INHABITANTS OF EASTHAMPTON.

Hampshire. September 18, 1894. — November 30, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Eminent Domain — Water Rights — Damages — Evidence.

The existence of a dam without a mill on land suitable for a mill site does not give the owner of the land a right, under the Pub. Sts. c. 190, to flow lands of upper riparian owners, but, as the land may have a greater market value on that account, it is proper in estimating the damages occasioned by the taking thereof by the right of eminent domain to take into consideration its value as a mill site, not only in connection with the water power then existing, but also in connection with the right which might thereafter be acquired by the flooding of the lands of upper riparian owners, the limit to the inquiry as to the possible future use of the land being left to some extent to the discretion of the presiding judge.

At the trial of a petition for the assessment of damages occasioned to the owner of a dam and of land suitable for a mill site by the diversion of water from the stream above the dam, and by the laying of pipes in the land below the dam, it appeared that the petitioner could not raise a head of water of any practical value, or obtain a reservoir as high as the dam, except by flowing lands belonging to others. The jury were instructed, in substance, that in estimating damages they were to allow the petitioner nothing on account of the dam; that they were to take into account the facts that the petitioner could flow back only about eighty rods on his own land, by doing which he could raise a head of no practical value; that by raising a head of water of practical use lands belonging to others would be flowed, which he could not do without paying them adequate damages

* The plaintiff offered in evidence photographs of her parents and sister, and of the latter's children, which she testified were correct likenesses, and had been shown by her to the defendant. They were admitted, against the defendant's exception.

therefor; that damages were not to be awarded in reference to the particular situation or circumstances or plans of the owner; but that they might award him such damages as he sustained by the taking of such water and rights as the respondent had been shown by the evidence to have taken, and such damages to his land as it had suffered by the laying of pipes in it, in view of such uses as the same, considered as property, could be profitably applied to, as shown by the evidence. *Held*, that the instructions were correct. *Held, also*, that the refusal to rule that the petitioner's water power "consisted in the difference of level between the surface where the brook first touches and where it leaves his land" gave the respondent no ground of exception.

At the trial of a petition for the assessment of damages occasioned to the owner of a dam and of land suitable for a mill site by the diversion of water from a stream above the dam, it appeared that the petitioner could not raise a head of water of any practical value or obtain a reservoir as high as the dam except by flowing land belonging to others, and evidence was admitted on the question of the value of the land as a mill site and of the uses which could be made of a reservoir so obtained. *Held*, that evidence offered by the respondent as to the value of the land of upper riparian owners which would be flowed by the petitioner's dam if a full reservoir were maintained was improperly excluded.

LATHROP, J. This is a petition for the assessment of damages occasioned to the petitioner by the taking of certain water rights, and by the laying of pipes in his land, under the St. of 1891, c. 252, entitled "An Act to supply the town of Easthampton with water."

At the trial in the Superior Court there was evidence that the petitioner was the owner of a dam across a stream called Bassett Brook, which dam had been built by the petitioner's grantor, partly at his own expense, and partly at the expense of the respondent, there being a highway across the dam; and that the petitioner owned land above the dam and land below it.

The respondent partly diverted the water of the stream, and laid pipes in the land below the dam.

It seems to have been taken for granted at the trial, that, although the petitioner had a valuable dam, he had no water power of any practical value except by flowing the land above, the evidence being uncontradicted that the water could be raised only two feet before flowing the land of the upper riparian owners; and the respondent asked that the evidence as to the value of the water power be limited to the power to be obtained by flowing only the petitioner's land. The presiding judge, however, admitted evidence to show the uses which could be made of the waters of the brook with such a reservoir as could be made by the dam. There was evidence that a full reservoir

as high as the dam would flow a valley nearly one mile long, the greater part of which was beyond the plaintiff's land. While this evidence was admitted, the presiding judge excluded evidence offered by the respondent as to the value of the lands which would thus be flowed.

Neither the petitioner nor his grantor had a mill on the stream, though there was evidence that the petitioner contemplated building one there.

The jury were instructed, in substance, that in estimating damages they were to allow the petitioner nothing on account of the dam; that they were to take into account the facts that the petitioner could flow back only about eighty rods on his own land, by doing which he could raise a head of no practical value; that by raising a head of water of practical use lands belonging to others would be flowed, which he could not do without paying them adequate damages therefor; that damages were not to be awarded in reference to the particular situation or circumstances or plans of the owner; but that they might award him such damages as he sustained by the taking of such water and rights as the respondent had been shown by the evidence to have taken, and such damages to his land as it had suffered by the laying of pipes in it, in view of such uses as the same, considered as property, could be profitably applied to, as shown by the evidence.

The bill of exceptions states that the evidence was carefully limited to show the beneficial use to which the water power of the petitioner in connection with his land could be put, and with reference to the feasibility of using the same as a mill privilege.

The respondent asked the judge to instruct the jury that the petitioner's water power consisted in the difference of level between the surface where the brook first touched and where it left his land. The judge declined to give this instruction.

The jury found for the petitioner; and the case comes before us on the respondent's exceptions to the rulings of the presiding judge.

The first question which arises is as to the construction of the bill of exceptions. It is not entirely clear whether the jury were allowed, in estimating the value of the land taken, to take into consideration its value as a mill site, not only in connection

with the water power which the petitioner then possessed, but also in connection with the right which the petitioner might acquire, by building a mill, to flood the lands on the stream above his own. It seems to us that a fair construction of the bill of exceptions shows that the jury were allowed to take the latter element into consideration.

Assuming this to be so, the question arises whether they were properly allowed so to do; and we are of opinion that they were.

Section 4 of the St. of 1891, c. 252, provides that the town "shall pay all damages sustained by any person or corporation in property by the taking of any lands, right of way, water, watercourse, water right or easement, or by any other thing done by said town under the authority of this act."

The rule is well settled in a case of this kind, where property is taken by the right of eminent domain, that the jury are to consider not only the value of that which is taken, but also the effect of the taking upon that which is left; and, as is stated by Mr. Justice Knowlton in *Maynard v. Northampton*, 157 Mass. 218, "In estimating the value of that which is taken they may consider all the uses to which it might properly have been applied if it had not been taken. In like manner, the effect on that which is left should be estimated in reference to all the uses to which it was naturally adapted before the taking. Damages are not to be awarded in reference to the peculiar situation or circumstances or plans of the owner, or to the business in which he happens to be engaged; but any and all of the uses to which the land considered as property may profitably be applied, whether contemplated by the owner or not, may well be taken into the account by the jury." See also *Boom Co. v. Patterson*, 98 U. S. 403.

It is true, as the respondent contends, that the mere existence of a dam upon the petitioner's land did not give him any right to flow the lands of other persons farther up the stream, under the Pub. Sts. c. 190; *Fitch v. Stevens*, 4 Met. 426; but a lot of land on a stream suitable for a mill site may have a greater market value on this account than it would have if it were not suitable for a mill site.

There is undoubtedly a limit to the questions which may be asked concerning the possible future use of land. *Gardner v.*

Brookline, 127 Mass. 358, 362. And to some extent this is a matter of discretion on the part of the presiding judge. *Providence & Worcester Railroad v. Worcester*, 155 Mass. 35. If we regard the question as one of discretion, the judge has exercised his discretion in favor of the petitioner.

The question to be determined is the fair market value of that which is taken and that which is left. In considering the uses to which the property may be put, the element of chance or probability may enter to some extent into the market value, and be considered by the jury. *Moulton v. Newburyport Water Co.* 137 Mass. 163.

In the case at bar, we see no error in the evidence admitted, or in the rulings given.

As to the ruling requested,* defining what the petitioner's water power was, while it has the great authority of Chief Justice Gibson in its support, *M'Calmont v. Whitaker*, 3 Rawle, 84, 90, we are of opinion that the refusal to give it affords the respondent no ground of exception. No question was made as to the extent of the petitioner's water power, and the jury were expressly instructed that they were to allow nothing on account of the dam; and that they were to take into account the facts that the petitioner could flow back only about eighty rods on his own land, by doing which he could raise a head of no practical value; and that by raising a head of water of practical use lands belonging to others would be flowed, which he could not do without paying them adequate damages therefor.

In the opinion of a majority of the court, however, the judge erred in refusing to admit the evidence offered by the respondent of the value of the lands which would be flowed by the petitioner's dam, if a full reservoir were maintained.

Whether the petitioner's land had any value as a mill site depended largely upon whether it was a practicable matter to flow the lands above. In determining this, the value of those lands would necessarily enter as an important element to be considered. They might be of so great a value that no man of reasonable prudence would consider that it was practicable to build a mill and flow the lands. While the jury were instructed

* The respondent requested the judge to instruct the jury "that plaintiff's water power consisted in the difference of level between the surface where the brook first touches, and where it leaves his land."

that they were to consider that the lands could not be flowed without the petitioner's paying adequate damages, evidence of an essential element in considering what these damages might be was excluded.

It is suggested that the judge had a right, in the exercise of his discretion, to exclude the evidence. But when he allowed the petitioner to go fully into a possible use of the land, and that a remote and contingent one, to reject evidence in reply tending to show such a use to be impracticable would be going beyond a legal discretion. *Exceptions sustained.*

A. J. Fargo & J. A. Aiken, for the respondent.

W. G. Bassett, for the petitioner.

JAMES B. CARROLL vs. ELIZABETH A. DALY.

Hampden. September 26, 1894. — November 30, 1894.

Present: ALLEN, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Taxation of Costs — Storage of Goods attached — Officer's Fees — Case stated.

Upon an appeal from the taxation of costs, the judgment of the Superior Court disallowing an item for the storage of goods attached cannot be revised by this court where no facts upon which the correctness of the judgment depends and no ruling of law appear upon the record.

A statement of facts agreed to by the counsel of the parties and filed in the Superior Court after a hearing therein, accompanied by a stenographic report of the testimony taken at the hearing, cannot be considered by this court if it does not appear by the record to have been passed on in the Superior Court.

An appeal from the judgment of the Superior Court brings before this court only matters of law apparent on the record.

LATHROP, J. This is an appeal from the taxation of costs. The record shows that in the Superior Court, in an action of contract to recover the sum of \$83, certain goods and chattels of the defendant were attached by a deputy sheriff on November 18, 1892; that the return of the officer on the writ states his fees at \$6.58; and that on January 16, 1894, the officer was allowed to amend his return by adding thereto the item, "Expense of storing the goods attached, \$210," this being accompanied by the sworn certificate of the officer that these expenses were actually incurred, and the charge reasonable. The record

also sets out the plaintiff's bill of costs, amounting to \$226.71, which included the item of \$210 for storage; that this item was disallowed by the clerk, and by a justice of the Superior Court on appeal; and that the plaintiff thereupon appealed to this court.

At the argument before this court, the parties sought to present the case on a statement of facts agreed to by their counsel, and filed in the Superior Court after the taxation by the clerk had been affirmed, accompanied by what purports to be a stenographic report of the testimony taken in the Superior Court. On the facts agreed and the inferences to be drawn from the testimony we are asked to review the finding of the justice of the Superior Court.

The proceedings are wholly irregular. The judgment of the Superior Court cannot be revised by this court upon matters of fact or discretion. *Hubner v. Hoffman*, 106 Mass. 346. *Briggs v. Taunton*, 110 Mass. 423. *Hawkins v. Graham*, 128 Mass. 20, 21. While an appeal will lie to this court from the judgment of the Superior Court, it brings before this court only matters of law apparent on the record. *Hawkins v. Graham*, 128 Mass. 20. See also *Miller v. Lyon*, 6 Allen, 514; *Barber v. Parsons*, 145 Mass. 203.

If the facts upon which the correctness of the judgment depends do not appear of record, the usual way to bring the questions sought to be raised to this court is by a bill of exceptions. *Barnes v. Smith*, 104 Mass. 363. *Hubner v. Hoffman*, 106 Mass. 346. *Briggs v. Taunton*, 110 Mass. 423.

If in this case the judge had allowed a bill of exceptions, and the parties had subsequently sought to vary it by filing a statement of facts, we could not have taken this statement into consideration. *Lee v. Kilburn*, 3 Gray, 594. Much less can we consider a statement of facts which does not appear by the record to have been passed on in the Superior Court.

In the case at bar the plaintiff seeks to justify the item for storage on the ground that it was necessary under the circumstances of the case. But there is nothing in the record to show that such necessity existed, or that the judge made any ruling as matter of law. The order therefore must be,

Judgment affirmed.

A. M. Copeland, for the plaintiff.

D. E. Webster, for the defendant.

COMMONWEALTH vs. WAYNE C. WHEELER.

Worcester. October 1, 1894. — November 30, 1894.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Indictment — Insufficient Allegation — “In said County” — Motion to Quash.

An indictment which begins with the words, “Commonwealth of Massachusetts, Worcester ss.,” and then describes the defendant as of Buckland in the county of Franklin, and alleges the offence to have been committed “at Westminster, in said county,” does not allege with sufficient certainty that the offence charged was committed within the county of Worcester, and a motion to quash the same should be granted.

INDICTMENT, charging a breaking and entering a railroad car by Wayne C. Wheeler of Buckland, and the larceny of goods therefrom.

In the Superior Court, before the jury was impanelled, the defendant filed a motion to quash the indictment on the ground that it did not appear from the allegations thereof that the offence set forth was committed, if at all, in the county of Worcester. *Lilley, J.* overruled the motion.

The jury returned a verdict of guilty; and the defendant alleged exceptions. The point in issue is sufficiently stated in the opinion.

H. L. Parker, Jr., for the defendant.

F. A. Gaskill, District Attorney, for the Commonwealth.

LATHROP, J. “Every material fact” in an indictment “must be stated with time and place in order that the grand jury may appear to have jurisdiction to find the bill, and also that the petty jury may be drawn from the proper county to try the case.” Per Lord Denman, C. J., in *Regina v. O’Connor*, 5 Q. B. 16, 31.

The defendant in the case at bar could not legally be convicted in the county of Worcester of the offence of which he was charged unless the indictment set forth that it was committed in that county. The indictment begins with the words, “Commonwealth of Massachusetts, Worcester ss.” The defendant is described as of Buckland in the county of Franklin, and

the offence is alleged to have been committed "at Westminster, in said county." According to the authorities such an indictment is bad, either because, two counties having been before named, it is uncertain to which the words "in said county" refer, or because these words refer to the last antecedent, namely, the county of Franklin. 2 Hale, P. C. 180. 2 Hawk. P. C. c. 25, § 34. 2 Gabb. Crim. Law, 210. 1 Chit. Crim. Law, (2d ed.) 194. *Elnor's case*, 1 Cro. Eliz. 184. 1 Wms. Saund. 308, n. *Regina v. Rhodes*, 2 Ld. Raym. 886. *The King v. Moor Critchell*, 2 East, 66. *State v. McCracken*, 20 Mo. 411. *Cain v. State*, 18 Tex. 391. *Bell v. Commonwealth*, 8 Grat. 600.

It is contended, however, that a different rule applies in this Commonwealth, on the authority of Chief Justice Parsons in *Commonwealth v. Springfield*, 7 Mass. 9, 12, where he says: "In England the limits of the several counties and parishes are not ascertained by public acts of Parliament, the records of which are remaining; but they are determined by ancient usage, of which the judges cannot judicially take notice. The case is different in Massachusetts. Our county limits and also the boundaries of our several towns are prescribed by public statutes, of which we are bound judicially to take notice. When from these limits or boundaries it appears that every part of any town is in the same county, of that fact we can judicially take notice." The indictment in that case was for not repairing a highway, described as running from a certain point in the town of Springfield to the town of South Hadley. Both towns were described as being within the county of Hampshire. The defective part of the road was described as being within the town of Springfield. The objection taken was that the location of the defective part of the road in Springfield was insufficient, because the court could not judicially presume that the whole of that town was within the county. It was of this fact that the court said that it could take judicial notice.

In *Commonwealth v. Cummings*, 6 Gray, 487, a complaint described the defendant as "of New Braintree in the county of Worcester," and charged the offence to have been committed "at New Braintree." This was held to charge the offence to have been committed at the same New Braintree which was before mentioned. But it was said by Mr. Justice Metcalf, in

delivering the opinion of the court, "If New Braintree had not been previously designated as within the county of Worcester, the complaint would have been insufficient to sustain a judgment."

In *Commonwealth v. Barnard*, 6 Gray, 488, a complaint to a justice of the peace within and for the county of Worcester charged the defendant, who was described as of Greenwich in the county of Hampshire, with selling intoxicating liquor "at West Brookfield." After conviction the defendant filed a motion in arrest of judgment, and was discharged. The opinion of the court, delivered by Mr. Justice Metcalf, was as follows: "It does not appear in this complaint that West Brookfield, the place where the defendant is charged with having sold intoxicating liquor, is either a town, or a place, within the county of Worcester. It therefore does not appear that any magistrate in this county, or any court held in this county, has jurisdiction of the offence set forth in the complaint. Hence the cases of *Commonwealth v. Springfield*, 7 Mass. 9, and *Commonwealth v. Cummings*, ante, 487, are quite distinguishable from this."

If the contention of the government in the case at bar is correct, then *Commonwealth v. Barnard* was wrongly decided, for the court judicially knew that there was a town named West Brookfield within the county of Worcester. So, here, while the court knows that there is a town named Westminster in the county of Worcester, there is no allegation that the offence was committed at the town of Westminster, but simply at Westminster, which is not alleged to be a town or a place within the county of Worcester.

In *People v. Breese*, 7 Cowen, 429, the offence was alleged to have been committed at the town of Frankfort, which distinguishes that case from the present.

The case of *Reeves v. State*, 20 Ala. 33, cited by the government, is clearly distinguishable. There the indictment was entitled in the margin, "The State of Alabama, Butler County." In the body of the indictment it was recited that "the grand jurors of the county of Buter upon their oaths present," etc. The name of the county was not again repeated, nor was any other county named. The offence was charged to have been committed "in the county aforesaid." This was held not to be

defective, on the ground that the court was bound to know the names of all the counties in the State, and, there being no such county as Buter, the words "in the county aforesaid" must refer to the county stated in the margin. Chief Justice Dargan, in delivering the opinion of the court, said: "I admit that if any county in the State besides Butler had been named in the indictment, and in a part of the indictment subsequent to the margin, then the words 'in the county aforesaid,' might not have shown, with sufficient certainty, in what county the offence was committed."

In the case at bar we are of opinion that the indictment does not allege with sufficient certainty that the offence charged was committed at a place within the county of Worcester, and that the motion to quash should have been granted.

Exceptions sustained.

CORNELIUS W. WALLS & another vs. DAMIEN DUCHARME.

Worcester. October 2, 1894. — November 30, 1894.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Mechanic's Lien — Repeal by Implication — Filing of Statement in Registry of Deeds — Overcharges for Labor — Evidence — Question for Presiding Justice.

Section 8 of Pub. Sts. c. 191, which provides in the case of liens on buildings and land that certain inaccuracies in the statement to be filed in the registry of deeds under § 6 of the statute shall not invalidate the lien unless the person filing it has wilfully and knowingly claimed more than is his due, is not repealed by the St. of 1892, c. 191, which amends said § 6 to the effect that no statement required by it shall be invalid for certain inaccuracies provided there was no intention to mislead and the parties entitled to notice were not in fact misled thereby.

If, at the trial without a jury of a petition to establish a mechanic's lien, there is evidence of overcharges for labor in the statement filed in the registry of deeds, and also evidence in explanation of such overcharges, it is for the judge to say whether, on all the evidence, the improper charges were made ignorantly, or whether the petitioner wilfully and knowingly claimed more than his due; and the appearance and manner of the petitioner in testifying may be taken into account.

LATHROP, J. This is a petition for a mechanic's lien, under the Pub. Sts. c. 191. The respondent is the owner of a lot of land,

and one Searles, rightfully acting for him, made an entire contract with the petitioners to furnish labor and materials to be used in the erection of a building on the lot, for the sum of \$2,645. No notice was given, as required by § 3 of the statute to give the petitioners a lien for materials, but an attempt was made to enforce a lien for the labor by filing a statement in the registry of deeds under § 6. This statement showed the amount due for labor, after allowing a credit of \$265.75, to be \$632.25.

The case was sent to an auditor, who found that the balance due for labor was \$242, and also found that the petitioners, in their statement filed in the registry of deeds, did not wilfully and knowingly claim more than was due them; and that they were entitled to enforce their lien.

At the trial in the Superior Court, without a jury, the judge found as a fact that the petitioners wilfully and knowingly in said statement claimed more than their due, and found for the respondent; and the case comes before us on the petitioners' bill of exceptions, which contains an abstract of the evidence at the trial in the Superior Court, and the auditor's report.

One of the issues framed by the parties, and on which the case was tried, both before the auditor and the court, was this: "Did the petitioners, in the statement which they filed in the registry of deeds of the amount due them for labor, wilfully and knowingly claim more than was due them for such labor?" In framing this issue, the parties evidently had in mind § 8 of the statute, which is as follows: "The validity of the lien shall not be affected by any inaccuracy in the statement relating to the property to be covered by it, if such property can be reasonably recognized from the description, nor by any inaccuracy in stating the amount due for labor or materials, unless it appears that the person filing the statement has wilfully and knowingly claimed more than is his due."

It is not contended that this section is repealed by implication by the amendment to § 6, enacted by the St. of 1892, c. 191, which adds, at the end of § 6, the following: "But no statement required by this section shall be deemed to be invalid or insufficient solely by reason of any inaccuracy in stating or failing to state the contract price, the number of days of labor performed or furnished, and the value of the same: provided it

is shown that there was no intention to mislead, and that the parties entitled to notice of the statement were not in fact misled thereby." Section 8 and the amendment to § 6 may well stand together, and we are of opinion that § 8 is still in force.

The question then is whether there was any evidence to warrant the judge in finding that the petitioners wilfully and knowingly claimed more than their due. In our opinion there was. The auditor's report was *prima facie* evidence in favor of the petitioners, but the case did not rest upon it. The petitioners both testified, and there was other evidence. Without going over this in detail, it is enough to call attention to the difference between the statement filed by the petitioners and the testimony of their bookkeeper. In the statement each petitioner charged for his labor six dollars a day. The bookkeeper testified that the salary of each was four dollars a day. In the statement charges were made for some of the men at the rate of four dollars a day, who, as the books and the evidence showed, were paid only one dollar and a half a day. There were also charges of six dollars a day for the labor of other men, who were paid from two to three dollars a day. There was undoubtedly evidence in explanation of the overcharges in the statement. The evidence for the petitioners tended to show that this was caused by the fact that each of four of the workmen had a helper, and that what was paid the helpers was included in the amounts charged as paid the workmen; also that the petitioners included in the charge for labor not only the amount paid the helpers, but a charge for rent, coal, breakage of tools, risk of business profit on labor, and perhaps other matters. It was for the judge to say whether, on all the evidence, these improper charges were made ignorantly, or whether the petitioners wilfully and knowingly claimed more than their due. The appearance and manner of the petitioners in testifying could be taken into account, and may have had much to do in determining the question in issue. We cannot say that there was no evidence which would warrant the judge in finding as he did. The order therefore must be,

Exceptions overruled.

C. M. Rice, (H. W. King with him,) for the petitioners.

B. W. Potter & H. W. Aiken, (E. J. McMahon with them,) for the respondent, were not called upon.

HANNORAH DROHAN vs. LAKE SHORE AND MICHIGAN
SOUTHERN RAILWAY COMPANY.

Worcester. October 3, 1894. — November 30, 1894.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

*Personal Injuries — Release of Claim — Avoidance of Release — Ratification —
Payment back of Money accepted in Satisfaction.*

A person who accepts a certain sum in satisfaction of a claim for personal injuries, and executes a release therefor under such circumstances as but for the acceptance of the money would entitle him to avoid the same, cannot thereafter, unless fraudulently induced to believe that the money received by him was payment for a part only of his cause of action, avoid the release and maintain an action without first tendering back the sum received.

TORT, for personal injuries occasioned to the plaintiff through the negligence of the defendant, while a passenger on its road, on July 8, 1892.

Trial in the Superior Court, before *Hopkins, J.*, who ordered a verdict for the defendant, and, at the request of the plaintiff, reported the case for the determination of this court. The facts appear in the opinion.

W. A. Gile, for the plaintiff.

F. P. Goulding, (*F. L. Dean* with him,) for the defendant.

LATHROP, J. The plaintiff, while a passenger on the defendant's road, was injured through the defendant's negligence, on July 8, 1892. On the next day she signed an instrument in writing, under seal, by the terms of which she agreed with the defendant company to accept the sum of \$1,000 "as full settlement and satisfaction of all claims and demands of every kind, nature, and description which I have or may be entitled to have against the said company by reason of loss or damage to property and for personal injuries" in consequence of the accident, "provided the same is paid me within thirty days from the date hereof."

On August 5, 1892, the defendant tendered the plaintiff the sum of \$1,000, which was received by her attorney, who signed the following receipt: "Received of O. G. Getzen Danner, one thousand dollars tendered Mrs. Drohan, August 5, 1892."

The report of the justice of the Superior Court, upon which the case comes before us, proceeds as follows: "There was also evidence tending to show that the release was executed under such circumstances as would have entitled the plaintiff to avoid the same if the sum tendered as provided therein had not been received by her or her attorney. And the court, being of opinion that she could not maintain her action without first tendering back the sum so received, ordered a verdict for the defendant."

Before making this ruling, the judge had excluded two letters offered in evidence by the plaintiff. One of these is dated July 18, 1892, and is addressed by the counsel for the defendant to the counsel for the plaintiff,* and the other is dated July 20, 1892, and is addressed by the counsel for the plaintiff to the counsel for the defendant. The first tends to show that the defendant contended that the agreement of July 9, 1892, was binding on the plaintiff, but did not know whether the defendant would pay the amount agreed upon. The other letter expresses a doubt whether the plaintiff will accept the amount mentioned, on the ground that the settlement was made when the plaintiff was injured, "and under the immediate physical and mental effect of such an accident." This letter concludes as follows: "I shall be glad to hear if you are to send a representative of your road here for a settlement, and when we may expect him, for I hope, if you desire to settle, it will be done this week, while her son, Father Drohan, is here, but she could not recognize any agreement or writing made under the circumstances in which I am informed this was."

If we assume, in favor of the plaintiff, that these letters were admissible, we do not see that they help her contentions, but, on the contrary, we are of opinion that they aid the case of the

* This letter, signed by O. G. Getzen Danner and addressed to Mr. W. A. Gile, was as follows: "I beg to advise you that Mrs. Drohan signed an agreement to settle with this company for the sum of one thousand dollars. I do not know whether or not we shall decide to settle for this amount, until we learn more fully the extent of her injuries. I do know, however, that at the time she signed this agreement, the amount being fixed at her own suggestion, that she was perfectly capable of entering into a contract. In fact, one of the witnesses to her agreement is her son, the Rev. Father N. J. Drohan."

defendant. Taken in connection with the other facts set forth in the report, they show that, after the plaintiff had signed an agreement to give a release, which was voidable on account of her condition at the time of signing, she consulted counsel, and this matter was presented to her mind, and she contemplated avoiding the agreement; but subsequently, nearly a month afterwards, the sum stated in the agreement was tendered to her, and her counsel, it must be assumed with her consent, received it, and signed a receipt for it. There is nothing in the report to show that any fraud was practised upon her at any time, nor is there anything to show that at the time she received the money she and her counsel did not fully understand what she was doing. When the tender was made of the amount mentioned in the agreement of July 9, and was received by her, without objection from her or her counsel, we can have no doubt that she adopted and ratified the former agreement. If either of them had any concealed intention to the contrary, it would be bad faith, and could not be shown. *Alden v. Thurber*, 149 Mass. 271, 275. See also *O'Donnell v. Clinton*, 145 Mass. 461; *Rosenberg v. Doe*, 146 Mass. 191; *Mansfield v. Hodgdon*, 147 Mass. 304. The verdict ordered for the defendant might well rest upon the ground of ratification.

As, however, the ruling of the court proceeded upon the ground that the action could not be maintained without first tendering back the money received, we proceed to consider this point.

The general rule is well settled, that, if a person enters into a contract, and afterwards seeks to avoid the effect of the contract on any ground that will entitle him to rescind it, he must first restore what he has received. *Coolidge v. Brigham*, 1 Met. 547. *Estabrook v. Swett*, 116 Mass. 303. *Brown v. Hartford Ins. Co.* 117 Mass. 479. *Burton v. Stewart*, 3 Wend. 236. *Bain v. Wilson*, 1 J. J. Marsh. 202.

In *Mullen v. Old Colony Railroad*, 127 Mass. 86, which was an action for personal injuries, the defence was a settlement of the case for \$450, by an instrument in writing signed by the plaintiff by his mark. The plaintiff's evidence tended to show that he was blind and illiterate, and that he was induced to affix his mark to the paper by fraudulent representations that

the money was given to him as a gratuity, and to support him until the trial, and without prejudice to his claim against the defendant. The court held that, if the jury believed this evidence, it was not necessary for the plaintiff to pay the money back. In other words, the decision was, that if the payment was a gratuity, or related to a part only of the cause of action, it was not necessary to return the money, so far as the rest of the cause of action was concerned. See also *O'Donnell v. Clinton*, 145 Mass. 461; *Bliss v. New York Central & Hudson River Railroad*, 160 Mass. 447.

In the case at bar there is nothing to show that the plaintiff was fraudulently induced to believe that the money which she agreed to receive, and which she did receive, was payment for a part of her cause of action. The case, therefore, falls within the general rule, and the ruling was right.

Judgment on the verdict.

NATHANIEL W. ARNOLD & others vs. MARY REED & others.

Plymouth. October 16, 1894. — November 30, 1894.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

Quieting Title — Conveyance by Executor without Authority — Acquiescence by Heirs — Presumption.

The recorded deed of an executor who purports to sell land of the testator under the license and authority of the Probate Court, when in fact he has no such license or authority either from the Probate Court or under the will of the testator, does not convey such a record title as will enable the grantee thereunder to maintain a petition under St. 1893, c. 340, against the devisees of the testator, to compel them to bring an action to try their alleged title to the land.

The St. 1893, c. 340, relative to quieting titles to real estate, does not extend to persons claiming under deeds in which the grantor purports to convey the land of others when no authority to make the conveyance appears of record in the registry of deeds or elsewhere.

There is no presumption that the recital in the deed of an administrator can be taken to be true as against the heirs.

At the hearing upon a petition under St. 1893, c. 340, to compel the devisees of a parcel of land to bring an action to try their alleged title to the land, which the executor of the will, without authority, sold and conveyed to the petitioner,

this court cannot consider the effect of proof offered by the petitioner that all persons interested in the estate at the time of the sale and conveyance acquiesced in the sale, and received without objection their share of the purchase money.

PETITION, dated June, 1893, under St. 1893, c. 340, to compel the respondents to bring an action to try their alleged title to several parcels of land in Abington.

Trial before *Allen, J.*, who declined to grant the prayer of the petition, and reported the case for the consideration of the full court. The material facts appear in the opinion.

W. J. Coughlan, for the petitioners.

No counsel appeared for the respondents.

FIELD, C. J. The question in this case is whether the petitioners allege and show a record title to the real property described in the petition, within the meaning of these words in St. 1893, c. 340. The deeds of Charles Stetson to the petitioners Nathaniel W. Arnold and Justin Meserve, and to Leonard Arnold, who has deceased and whose heirs join in the petition, purport to be given by said Stetson as administrator of the estate of Josiah Shaw, deceased, late of Abington in the county of Plymouth, under an order of the Probate Court for the County of Plymouth, whereby he was licensed and empowered to sell and convey the real estate of such deceased, etc. These deeds are substantially in the usual form of deeds by executors and administrators licensed by a Probate Court to sell real estate in order to pay debts and legacies.

The petition alleges that said Shaw died seised and possessed of said real estate in fee, and devised the same to his heirs at law; that Stetson was duly appointed administrator of his estate with the will annexed; that on October 15, 1870, Stetson sold the property at public auction, claiming to act under a license of the Probate Court; that the purchasers, or those claiming under them, have been in occupation ever since; but that "said Stetson, who is now deceased, had no license, power, or authority, either under the will of said Josiah Shaw, or from said Probate Court, to sell any of the lands of which said Shaw died seised and possessed, nor was the condition of said Josiah Shaw's estate such as to authorize said Probate Court to issue license for the sale of any part of the real estate thereof."

On the face of the record of the registry of deeds, if the recitals in the deeds given by Stetson are taken to be true, the deeds conveyed a good title, but in fact the recitals are not true, and this would appear by an examination of the records of the Probate Court.

The Probate Courts are courts of record. Pub. Sts. c. 156, §§ 1, 27. Deeds may convey a good title which yet does not appear of record anywhere. The heirs of deceased persons usually do not appear of record anywhere. Title by adverse possession usually does not appear of record. A forged deed conveys no title, although, if executed in the name of the record owner, it appears on the face of the record to convey a title. A deed executed by an attorney, if the power of attorney is not recorded, conveys no title of record, yet if the attorney is authorized in fact his deed conveys the title as between the parties.

It is to be noticed that St. 1893, c. 340, repealed Pub. Sts. c. 176, where the language was broader, and was not confined to a record title, and that it adopted in this respect the language of St. 1882, c. 237, and St. 1885, c. 283. See St. 1889, c. 442; St. 1890, c. 427; *Leary v. Duff*, 137 Mass. 147.

In the case at bar the sale was absolutely void. We know of no presumption that the recital in the deed of an administrator can be taken to be true as against the heirs. They are the recitals of the administrator, and not of the heirs. The record of the registry of deeds and the record of the Probate Court in this case show no authority in the administrator, and he had in fact no authority. If the grantees under these deeds have a record title within the meaning of St. 1893, c. 340, we do not see why it must not be held that a deed which is recorded, and which purports to be executed by an attorney in the name of a principal, does not give a record title to the land of the principal, although there is no record of any power of attorney, and no authority in fact has been given. We think that such was not the intention of the statute. Whatever may be true of deeds in which the grantor purports to convey his own land, we think that the statute cannot be held to extend to persons claiming under deeds in which the grantor purports to convey the land of others, when no authority to make the conveyance appears of record in the registry of deeds or elsewhere.

We cannot consider in this proceeding the effect of the offer of proof, that all persons interested in the estate at the time of the sale and conveyance acquiesced in the sale, and received without objection their shares of the purchase money, whatever may be the effect of this in a suit in equity. In the opinion of a majority of the court this petition is not within the purview of the statute, and must be dismissed. *So ordered.*

COMMONWEALTH vs. MARY MOORE.

Plymouth. October 16, 1894. — November 30, 1894.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

Perjury — Evidence — Statute — Husband and Wife — Presumption of Coercion.

Where a wife at the trial of a criminal case is a witness under the Pub. Sts. c. 169, § 18; for her husband, who is present in the prisoner's dock, and she commits perjury, there is no presumption that her testimony was given under the coercion of her husband, and she is not exempt from the penalties imposed for the offence.

INDICTMENT for perjury. At the trial in the Superior Court, before *Bishop, J.*, it appeared in evidence that the perjury was committed under the following circumstances.

The husband of the defendant, John Moore, had been complained of for illegally keeping and exposing liquors for sale, and upon a hearing before the Police Court of the City of Brockton had been found guilty. On the trial of his appeal, at the October term, 1893, of the Superior Court, he took his place in the prisoner's dock, and was defended by counsel. After the government had rested its case, his counsel called his wife, the defendant in this case, to the stand as a witness in his behalf. She took the oath, went upon the witness stand, and committed the perjury for which she was indicted. During all the time that she was testifying, and when called to the stand, her husband, John Moore, was present in court in the prisoner's dock.

At the trial of this indictment against her, the government introduced evidence tending to show the facts above stated, and

then introduced evidence tending to prove the perjury. There was also evidence showing that after the trial of the husband, John Moore, for illegally keeping liquor as aforesaid, the defendant was overheard to say that, if a new trial of that case was granted, she would have to give the same testimony again, and would get five years for perjury.

This was all the evidence submitted, and upon it the defendant asked the judge to rule: "1. If the defendant committed perjury as alleged, in her husband's case and in his presence, it is a presumption of law that she acted under the coercion and control of her husband. And this is a conclusive presumption unless overthrown by affirmative evidence. 2. If the defendant committed perjury in the presence of her husband, or while he was near enough to hear, see, or know that she was committing perjury, then she is presumed to be acting under his coercion, and, in the absence of any evidence to the contrary, is not liable, and must be acquitted. 3. There is no evidence in this case sufficient to control the presumption that the defendant, at the time she committed perjury, was acting under the coercion and control of her husband, and the jury should be instructed to return a verdict acquitting the defendant."

The judge gave the first two instructions requested, and declined to give the third; and further instructed the jury that in such a case the question of fact to be determined is whether a defendant really and in truth acted under the coercion of the husband, or acted of her own free will and independently of any coercion or control by him; that the presumption of coercion exists, but may be rebutted, and the question of fact is to be determined from all the circumstances surrounding the act; that the ultimate question whether the wife acted under the coercion of the husband or independently of it is to be determined in view of the presumption arising from his presence and of the testimony or circumstances tending to rebut it; and that in this case all the circumstances surrounding the act were to be judged of by the jury.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

S. J. Thomas & P. R. Blackmur, for the defendant.

R. O. Harria, District Attorney, for the Commonwealth.

LATHROP, J. This case was tried as if the offence charged were an ordinary crime committed by the defendant in the presence of her husband. Treating it as such, we have no doubt that the rulings given, and the refusal to rule as requested, were right. It is a general rule, that, where a criminal act is done by a wife in the presence of her husband, or in proximity to him, a presumption in her favor is raised that she is acting under his coercion. This presumption is, however, not conclusive, and may be rebutted by testimony or the attendant circumstances, and it is for the jury to say whether or not she acted under coercion or of her own free will. *Commonwealth v. Daley*, 148 Mass. 11, and cases cited.

In the case at bar it cannot be said that there was no evidence to rebut the presumption. Under the Pub. Sts. c. 169, § 18, cl. 2, the wife could not be compelled to be a witness on the trial of the complaint against her husband. The language of the statute is, "Neither husband nor wife shall be compelled to be a witness on any trial upon an indictment, complaint, or other criminal proceeding, against the other." When, therefore, the wife took the stand, at the call of the counsel for her husband, she could have invoked the protection of the court, if she did not wish to testify. The jury had the right to determine whether her testimony was given voluntarily or under coercion.

We are inclined to the opinion, moreover, that where a wife testifies in behalf of her husband, under the Pub. Sts. c. 169, § 18, the rule that there is a presumption of coercion does not apply, and that the first two rulings requested and given were too favorable to the defendant. The statute, by saying that a wife shall not be compelled to testify, apparently assumes that, if she does testify, she is a voluntary witness. The testimony is in open court, and is given under the solemnity of an oath. It is to be considered by the jury, but very little weight ought to be given to it if there is a presumption that it is given under coercion of her husband. The better rule would seem to be, that where a wife is a witness under the statute above cited, and commits perjury, she is not exempt from the penalties imposed for that offence.

While we have found no case bearing directly upon this point, the cases decided under the next clause of the same

section of the statute, which allows a person charged with an offence or crime to testify in his own behalf at his trial, are somewhat analogous. Such a person cannot be compelled to testify, but if he offers himself as a witness, and testifies, he is treated as any other witness, and is obliged to testify to any matter pertinent to the issue in the case. *Commonwealth v. Mullen*, 97 Mass. 545, 546. *Commonwealth v. Bonner*, 97 Mass. 587, 589. *Commonwealth v. Morgan*, 107 Mass. 199, 205. *Commonwealth v. Nichols*, 114 Mass. 285, 287. *Commonwealth v. Tolliver*, 119 Mass. 312. *Commonwealth v. Sullivan*, 150 Mass. 315, 317. And it has been held in other jurisdictions that, if a person so testifying commits perjury, he may be indicted therefor. *Mackin v. People*, 115 Ill. 312. *Mattingly v. State*, 8 Tex. App. 345. *State v. Maxwell*, 28 La. An. 361.

In either view of the case, the order must be,

Exceptions overruled.

SAMUEL B. HOPKINS vs. SUSAN M. SMITH & others.

Dukes County. October 22, 1894. — November 30, 1894.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

Equitable Easement — Deed — Restrictions — Assignment of Possibility of Reverter after Breach of Condition Subsequent.

The owner of a tract of land divided it into lots, each of which he conveyed subject to the conditions and restrictions that "the grantee shall within one year from the date hereof cause to be erected on the premises granted a dwelling-house to be exclusively used as a residence for a private family; and no other buildings except the necessary outbuildings requisite and to be used exclusively for domestic purposes shall ever be erected thereon." Held, that these conditions and restrictions were inserted for the benefit of purchasers who took deeds subject thereto, and that they could be enforced in equity by and against such purchasers and their grantees.

The right of entry on breach of condition subsequent cannot be assigned to a stranger, and if conditions and restrictions in deeds are for the benefit of purchasers and their grantees, they cannot be released to a subsequent purchaser or his grantee without the assent of the other purchasers or their grantees for whose benefit the restrictions were imposed.

BILL IN EQUITY to restrain the defendants from the use of their premises for business purposes in violation of the restric-

tions of a deed. Trial in the Superior Court, before *Braley, J.*, who found the following facts.

On August 3, 1867, the Oak Bluffs Land and Wharf Company, being seised in fee of a tract of land in that part of Edgartown now comprised in the town of Cottage City, caused the same to be laid out into house lots, streets, avenues, and parks, according to a plan, and to be placed upon the market for sale, under a form of deed prepared by the company, and used by it in all its conveyances of such lots.

On August 18, 1868, the company sold lot numbered thirty-one on the plan to one Cornell, and on December 10, 1868, sold lot twenty-nine to one Lovell. These lots adjoined, and the westerly line of lot thirty-one and the easterly line of lot twenty-nine coincided. The deeds of the lots were similar in form, and contained in the granting part the following clause: "This conveyance is made upon the following conditions, the non-fulfilment or breach of any one of which shall work a forfeiture of the estate hereby conveyed, and 'reinvest' the same in the grantor, viz.: the said grantee shall, within one year from the date hereof, cause to be erected on the premises granted a dwelling-house to be exclusively used as a residence for a private family; and no other buildings except the necessary outbuildings requisite and to be used exclusively for domestic purposes, shall ever be erected thereon; and the said grantor shall have the refusal of said granted premises whenever offered for sale by the said grantee, their heirs or assigns."

By mesne conveyances lot thirty-one vested in the plaintiff, and lot twenty-nine in the defendants, and all mesne conveyances as to each lot referred to the restrictions contained in the deeds of the company to Cornell and Lovell. Dwelling-houses for private families were built on each lot, and were occupied as such at the time of the filing of the plaintiff's bill. Other lots were from time to time sold and conveyed by the company to other purchasers, subject to like conditions; and dwelling-houses were built thereon. In a few instances the conditions were modified, but in none where a lot was sold for purposes of residence was the condition omitted that it should be used exclusively for the erection of a dwelling-house for a private family.

The company in many instances, after the sale of its lots, released to purchasers its right to enforce the condition as to dwelling-houses, and its exclusive use for a private family, but no such release was ever made as to lots twenty-nine and thirty-one.

On October 9, 1882, the company conveyed to one Landers "all the right, title, and interest of said company in and unto the following tracts of land," including therein lot twenty-nine, "to have and to hold the granted premises, with all the privileges and appurtenances thereto belonging, to the said George M. Landers, trustee, his successors and assigns, to their own use and behoof forever."

By a declaration of trust, executed on March 20, 1884, Landers, after reciting the release to him by the company, and that several of the parcels of land described therein had theretofore been conveyed by the company to sundry purchasers by deeds imposing conditions and restrictions upon their use and enjoyment, and that the release was given to him as trustee by the company for the further protection of certain persons (not parties to this suit), owners of lots included in the premises described in the release, or in the immediate vicinity thereof, with full power and authority to insist upon and enforce the conditions and restrictions contained in the original deeds as fully as the company might have done had the release been given, declared that he held whatever right, title, and interest and authority he had acquired by said release deed in trust for the benefit and for the protection of the persons previously named, and that he had "no right without the consent of all the beneficiaries above named, or their assignees or legal representatives, to aliene or convey the title acquired by me by said release deed, or to discharge any lot or persons from the conditions and restrictions imposed by said original deed above referred to, or any of them, and that I will not undertake so to do."

On March 29, 1893, Landers, in accordance with the terms of the declaration of trust, released lot twenty-nine to one Pierce, who, on October 15, 1893, released the northerly half thereof to William E. Tanner, together with all his right to enforce the conditions and restrictions contained in the original deed of the

Oak Bluffs Land and Wharf Company so far as it applied to that portion of the lot.

It did not appear that the owners of lots twenty-nine and thirty-one, or their successors in the title, or the owners of other lots, knew of or assented to the release of conditions by the company, or of the deeds from it to Landers, or from him to Pierce.

In July, 1894, Tanner, with the knowledge and assent of the other defendants, used the northerly part of lot twenty-nine for the storage, repair, sale, and letting of bicycles, and was publicly trading thereon, thereby causing annoyance to the plaintiff, and injuring the use and enjoyment of his property.

The conditions and restrictions that the lots should be used exclusively as a residence for a private family, and that no public trading should be there carried on, were reasonable and proper.

The judge entered a decree restraining the defendants from using lot twenty-nine, or any part thereof, or the buildings thereon, for any purpose whatever except that of a dwelling-house to be exclusively used as a residence for a private family; and the defendants appealed.

C. G. M. Dunham, for the defendants.

B. T. Hillman, (*F. D. Allen* with him,) for the plaintiff.

FIELD, C. J. We think it plain, on the findings of fact by the court, that the conditions and restrictions in the deeds from the Oak Bluffs Land and Wharf Company, under which the plaintiff and the defendants claim, were inserted for the benefit of purchasers from that company, who took deeds subject to these conditions and restrictions, and for the benefit of the grantees of such purchasers, and that therefore the restrictions can be enforced in equity by and against such grantees. *Jackson v. Stevenson*, 156 Mass. 496. *Hano v. Bigelow*, 155 Mass. 841. *Collins v. Castle*, 36 Ch. D. 248.

We are not called upon to consider what the right of the company would have been to convey the estates free from the conditions and restrictions, if the company had entered for breach of condition. The company has not taken advantage of the breach, if it could do so. The right of entry on breach of condition subsequent cannot be assigned to a stranger, and

if the conditions and restrictions were for the benefit of purchasers and their grantees, these conditions and restrictions could not be released to a purchaser or his grantee without the assent of the other purchasers or their grantees, for whose benefit they were imposed. *Rice v. Boston & Worcester Railroad*, 12 Allen, 141. *Trask v. Wheeler*, 7 Allen, 109. *Guild v. Richards*, 16 Gray, 309. Gray, Rule against Perpetuities, § 282.

Decree affirmed.

NATHANIEL B. HORTON & others vs. EMMA P. EARLE
& others.

Bristol. October 22, 1894. — November 30, 1894.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

Probate Court — Equity Procedure — Lapsed Legacy — Relation.

Where, upon a petition to the Probate Court for the construction of a will, the procedure was not according to the rules of pleading and practice in equity causes, but all persons interested were shown to have appeared and been there heard, they were afterward heard in this court on appeal, both by a single justice and the full court.

A testator, by his will, bequeathed the residue of his estate to A. and B., the latter of whom was the testator's brother in law, "to be equally divided between them, share and share alike to them and their heirs and assigns." Held, that on the death of B. in the lifetime of the testator the legacy to him lapsed.

A brother in law is not a relation within Pub. Sts. c. 127, § 23.

PETITION to the Probate Court, by the executor of the will of Sarah B. Horton, the widow of Danforth Horton, for the construction of the will. The record of the Probate Court, transmitted to this court on appeal, consisted of the petition, the citation, the decree, and the notice of appeal. The petition alleged that Sarah B. Horton died on June 14, 1890, leaving the respondents as her heirs at law, and leaving a will, the eleventh clause of which was as follows: "All the rest and residue of my property and estate, both real and personal, wherever and whatever the same may be, I give, devise, and bequeath to Hiram Horton and Nathaniel B. Horton, to be equally divided between them, share and share alike to them and their heirs and assigns";

and that Hiram Horton was a brother of the deceased husband of the testatrix, and died on April 30, 1888, intestate, and his heirs at law, as well as Nathaniel B. Horton, the surviving residuary legatee, who were joined with the executor in the petition, claimed the property of which the testatrix had by the residuary clause of her will attempted to dispose.

The prayer of the petition was for the construction of the above clause, and for instructions as to the proper distribution of the residue. The citation "to the heirs at law, next of kin, and all persons interested under the will of Sarah B. Horton," provided for notice by publication in a newspaper, and contained a sworn return that it had been served as therein required. The judge of the Probate Court entered a decree, which, after reciting that due notice had been given according to the order of the court, and that all parties had appeared and had been fully heard, adjudged that one half part of the portion of the estate of the testatrix, which is designated in the eleventh section of the will, passes as a bequest unto Nathaniel B. Horton; and that the other half part of the estate designated in said eleventh section passes as intestate estate unto the heirs at law of Sarah B. Horton, the testator. From this decree the petitioners appealed.

At the hearing in this court, before *Knowlton*, J., the decree of the Probate Court was affirmed, and the petitioners appealed to the full court.

A. H. Hood, for Nathaniel B. Horton.

E. D. Stetson, for the heirs of Hiram Horton.

A. J. Jennings, for the respondents.

FIELD, C. J. This is a petition to the Probate Court for the construction of a will, and although the procedure in that court was not according to the rules of pleading and procedure in equity causes, it appears that all persons interested appeared and were heard, and they have been heard in this court on appeal, both by a single justice and the full court. See *Green v. Hogan*, 153 Mass. 462.

The particular clause in the will of Sarah B. Horton to be construed is as follows: "All the rest and residue of my property and estate, both real and personal, wherever and whatever the same may be, I give, devise, and bequeath to Hiram Horton

and Nathaniel B. Horton, to be equally divided between them, share and share alike to them and their heirs and assigns." Hiram Horton died before the testatrix, and he was the brother of the deceased husband of the testatrix, but not otherwise any relation of the testatrix. He was not, therefore, a relation of the testatrix within the meaning of Pub. Sts. c. 127, § 23. *Kimball v. Story*, 108 Mass. 382.

This residuary legacy is not to a class, but to two persons by name, and the effect of it is that one half of the residue is given to one person by name, and one half to the other. *Workman v. Workman*, 2 Allen, 472. *Clafin v. Tilton*, 141 Mass. 343. The addition of the words "and their heirs and assigns," only shows that the whole property in the residue was given absolutely, or so far as it was real property that it was given in fee, if the testatrix owned a fee. Hiram Horton having died before the testatrix, the legacy to him lapsed. *Kimball v. Story*, 108 Mass. 382. *Wood v. Seaver*, 158 Mass. 411. *Bryson v. Holbrook*, 159 Mass. 280. *Decree affirmed.*

HENRY RIPLEY vs. BENJAMIN G. COLLINS, administrator.

Dukes County. October 23, 1894. — November 30, 1894.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

Probate Appeal — Hearing without the Venue — Insolvent Estate — Creditor.

A single justice of this court sitting in equity may order a probate appeal to be heard in a county other than that in which it is brought.

The estate of a deceased person was represented insolvent, and commissioners were appointed who allowed the claim of a creditor, and the administrator appealed to this court, where, by a decree of a single justice, from which no appeal was taken, the claim was established, and the cause was remanded to the Probate Court in which a copy of the decree was filed. Subsequently one of the original commissioners resigned and another one was appointed in his place, and further proceedings were had before the commissioners wherein other claims were passed upon by them. *Held*, that the later proceedings of the commissioners did not affect the validity of the decree of this court, and that the creditor whose claim was thereby established was entitled to prosecute a petition to the Probate Court to compel the administrator to file a bond with sufficient sureties, and to collect certain assets of the estate consisting of property alleged to have been conveyed by the intestate in his lifetime in fraud of his creditors.

FIELD, C. J. The estate of Grafton N. Collins, late of Edgartown, in the county of Dukes County, was represented insolvent by Benjamin G. Collins, the administrator, and Henry Ripley, on September 5, 1890, presented his petition to the Probate Court, representing that he was a creditor of the estate, and praying that the administrator be ordered to file a bond with sufficient sureties, and to collect certain assets of the estate, which consisted of property alleged to have been conveyed by said Grafton N. Collins in his lifetime, in fraud of his creditors. On May 24, 1894, the Probate Court entered a decree that the administrator file a bond with sufficient sureties, and that Ripley be empowered to bring suits to recover said property in the name of the administrator, first giving a bond, with sureties to be approved by the court, conditioned to indemnify the administrator against all costs and damages growing out of said suits. From this decree the administrator appealed to the Supreme Judicial Court. The alleged reason of appeal was that the Probate Court had erred in deciding that Ripley was a creditor of the estate. On motion of the petitioner, and after notice to the administrator, and a hearing of the parties, a single justice of this court, sitting in equity in Boston in the county of Suffolk, ordered this appeal to be heard in Boston on the second Tuesday of September, 1894, it appearing, as the order recites, "that unreasonable delay would result if the case were heard at the regular sitting of the court in Bristol County." The regular sitting of this court then next to be held by a single justice in Bristol County would not be held until after the regular sitting of the full court for that county; so that, if the case were not heard by a single justice until the regular sitting in that county, and an appeal were taken from his decision to the full court, this appeal would regularly be heard by the full court at its sitting to be held in that county in October, 1895. The single justice heard the appeal in Boston, and on September 12, 1894, entered a decree affirming the decree of the Probate Court, and remanding the cause to that court for further proceedings. From this decree the administrator appealed to the full court. The administrator also excepted to the order of the single justice directing the cause to be heard in Boston. The contention of the appellant is, that it was beyond the power of a justice of this court to

order the appeal from the Probate Court to be heard in Boston, in order to prevent unreasonable delay. His contention, in effect, is that the cause must be heard in the county where the petition was filed, unless both parties consent to a hearing elsewhere; and the foundation of the argument is that actions must be tried in the county in which they are brought, unless on the ground of local prejudice or some other cause they are removed into some other county in order to insure an impartial trial. St. 1887, c. 347. Under the statutes, the Supreme Judicial Court does not sit in the county of Dukes County, and the cause could not be tried there by that court; Pub. Sta. c. 150, § 35; St. 1891, c. 287; but the contention of the appellant perhaps does not go so far as to ask that these statutes should be held unconstitutional.

We are of opinion, however, that it is unnecessary to consider what the limits of the power of this court are under the Constitution and the statutes to try actions at common law, either with or without a jury, in counties other than that in which they were or should have been brought. This is not a suit at common law. By the Constitution of Massachusetts, c. 3, art. 5, "All causes of marriage, divorce, and alimony, and all appeals from the judges of probate, shall be heard and determined by the Governor and Council, until the Legislature shall, by law, make other provision." Under this provision, the Governor and Council did not sit in the several counties of the Commonwealth. By St. 1783, c. 46, the Legislature made the Supreme Judicial Court the Supreme Court of Probate, and provided for appeals to that court. See *Sparhawk v. Sparhawk*, 116 Mass. 315. Without citing all the statutes since passed on the subject, the Pub. Sta. c. 156, § 11, relating to probate appeals, provide that "Appeals and petitions for appeal shall be entered on the same docket with cases in equity, and shall have the same rights as to hearing and determination as such cases." See Gen. Sta. c. 117, § 14; St. 1859, c. 237, §§ 7, 12. The Pub. Sta. c. 151, § 23, relating to cases in equity, provide that "A single justice or the full court may, when needful, hear and determine cases pending in a county other than that in which such justice or court is sitting, or any motion therein. All orders and decrees made on such hearings shall be transmitted to the clerk in the

proper county, to be by him entered." See Pub. Sts. c. 151, §§ 25, 30, 31, 33; Gen. Sts. c. 113, §§ 18, 19, 20, 22, 26; St. 1859, c. 237, § 7; St. 1859, c. 196, §§ 49, 50; Rev. Sts. c. 81, § 20 *et seq.*; St. 1826, c. 109.

When the Constitution was adopted, the High Court of Chancery in England did not sit in the several counties of England, and the distribution of the assets of the insolvent estates of deceased persons in England was by a suit in equity. In Massachusetts there is no absolute right to a jury in equity cases or in probate appeals, except as provided for by the Constitution or the statutes; and this appeal is not within the provisions of the Constitution or of the statutes requiring a jury trial, and none was asked for by either party. We have, therefore, no occasion to consider the scope of St. 1885, c. 384, §§ 2, 3, in common law actions, or even in equity suits or probate appeals, because we have no doubt of the power of a justice of this court to order this appeal to be heard in Boston by virtue of the other provisions of statute we have cited, and of the rules which have been established for discouraging delays and expediting the decision of cases in equity and probate appeals. Pub. Sts. c. 151, § 33. Rule V. in the Order of Business in Suffolk County. *Thompson v. Goulding*, 5 Allen, 81.

The remaining contention of the appellant is that Ripley was not a creditor of the estate, and therefore not entitled to prosecute the petition. On this question the facts are briefly as follows. On September 1, 1890, the administrator represented the estate insolvent, and on September 19 two commissioners were duly appointed to receive proof of claims against the estate. They proceeded to perform their duties, and made their return on July 20, 1891. In the return the petitioner is put down as a creditor to the amount of \$6,000. On October 11, 1891, the administrator appealed from the allowance of this claim to the Supreme Judicial Court, and this appeal came on to be heard at a regular sitting of this court in Bristol County; the appellant was called, and made default; and the court proceeded to examine the petitioner and his witnesses, and entered a decree that the said Grafton N. Collins, at the time of his decease, was indebted to the petitioner in the sum of \$6,000, and interest up to the time of his decease, amounting in all to the sum of

\$7,236.96; and was also indebted to the petitioner in the further sum of \$98.26, and interest up to the time of his decease, amounting in all to the sum of \$121.04; and ordered that the list of debts allowed by the commissioner should be altered to conform to this decree, and remanded the cause to the Probate Court for further proceedings. A copy of this decree was duly filed in the Probate Court on February 11, 1892. On February 15, 1892, one of the commissioners resigned, and his resignation was accepted, and on February 23, 1892, another commissioner was appointed in his place. Further proceedings were had thereafter before the commissioners, and they made a report of their doings, in which they disallowed an additional claim against the estate in favor of one Abbott; but this report did not include the name of the petitioner. No appeal was ever taken to the full court from the decree of a single justice of this court allowing the claim of the petitioner. When one of the original commissioners resigned, and a new commissioner was appointed in his place, the claim of the petitioner, against the estate had been established by a decree of a single justice of this court, from which no appeal had been taken, and a copy of this decree was then on file in the Probate Court. The proceedings of the commissioners after the new commissioner was appointed could not affect the validity of this decree, nor did their report purport to affect it. It purports to be a report of claims received and examined and "not included in the report already filed." The only want of regularity, if there be any, is that the Probate Court has not amended the list of claims so as to conform to the decree of the justice of this court; but this is merely a matter of form. Pub. Sta. c. 137, § 13. It was not in the power of the Probate Court, or of the commissioners, to alter the decree of the justice of this court, and they never undertook to alter it; and on the records of the Probate Court the petitioner appeared as a creditor by an adjudication which was final between the parties.

Decree affirmed.

C. W. Clifford & G. C. Abbott, (O. Prescott, Jr. with them,) for the appellant.

H. M. Knowlton & A. E. Perry, for the petitioner.

JOSEPH BOOTH vs. BRISTOL COUNTY SAVINGS BANK
& another.

Bristol. October 23, 1894. — November 30, 1894.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

Savings-bank Book — Title to Deposit — Instructions — Claimant — Gift.

In an action to recover money deposited by the plaintiff with the defendant savings bank the exceptions stated that "there was no evidence that the claimant ever gave the book to the plaintiff, except when the claimant ordered the plaintiff to make withdrawals or deposits." The plaintiff requested the judge to rule that it was immaterial to whom the money originally belonged; if the claimant delivered the book to the plaintiff and permitted him to exercise control over the same, the gift was complete, and the claimant could not come in and claim the funds. *Held*, that the ruling was rightly refused.

In an action to recover money deposited by the plaintiff with the defendant savings bank, it appeared that the claimant, who intervened under the St. of 1894, c. 317, § 33, deposited the money and took out the book in the name of the plaintiff. The plaintiff requested the judge to rule that, if the book was delivered to the plaintiff without the intention on the part of the claimant of parting with his title to the funds, the verdict must still be for the plaintiff. *Held*, that the ruling was rightly refused, and that the ruling that it was for the jury to say, upon the evidence, whether the claimant had ever made a gift of the money to the plaintiff, as the plaintiff contended, or whether it was as the claimant contended, was correct.

CONTRACT, to recover money deposited by the plaintiff with the defendant bank. John Booth intervened as a claimant of the fund, under the St. of 1894, c. 317, § 33.

At the trial in the Superior Court, before *Sherman, J.*, it appeared in evidence that the savings bank book stood in the name of the plaintiff, and showed various sums deposited and withdrawn from 1886 to 1894 by the plaintiff, who testified that the claimant John Booth, his father, gave him all money so deposited as a present, and that the book had always been kept in a place known only to the plaintiff and the claimant. This the claimant denied, and testified that he himself had always had possession of the book from the time it was issued, that he had never given any of the money to the plaintiff, that it was deposited in the plaintiff's name because the claimant was nervous and a poor writer, and for the sake of convenience.

and that the plaintiff was in the matter acting as the claimant's agent. The claimant called several witnesses, whose testimony tended in some particulars to corroborate his claim. It was admitted that all the money so deposited was originally the money of the claimant. There was no evidence that the claimant ever gave the book to the plaintiff, except when the claimant ordered the plaintiff to make withdrawals or deposits.

A bank clerk testified that the bank never saw, and did not know, the claimant in the matter. The claimant had another deposit and book in the same bank, commencing subsequently to the first deposit on this book, when that deposit had reached over one thousand dollars.

The plaintiff requested the court to rule: "1. That it was immaterial to whom the money originally belonged; if the claimant delivered the book to the plaintiff, and permitted him to exercise control over the same, the gift was complete, and the claimant could not come in and claim the funds. 2. That if the book was delivered to the plaintiff without the intention of parting with his title to the funds, the verdict must still be for the plaintiff."

The judge declined so to rule, but ruled substantially that it was for the jury to say, upon this evidence, whether the claimant had ever made a gift of this money to the plaintiff, as the plaintiff contended, or whether it was as the claimant contended, and to return their verdict for the plaintiff or claimant accordingly.

The jury returned a verdict for the claimant; and the plaintiff alleged exceptions.

F. V. Fuller, for the plaintiff.

F. S. Hall, for the claimant.

LATHROP, J. The first instruction requested in this case was rightly refused. The exceptions expressly state that "there was no evidence that the claimant ever gave the book to the plaintiff, except when the claimant ordered the plaintiff to make withdrawals or deposits."

The second request for a ruling was also rightly refused. The plaintiff contends that, where A. deposits money in a savings bank in the name of B., and takes out a book in the name of B., this is an executed gift to B., and the money

belongs to him. For this position he cites *Sweeney v. Boston Five Cents Savings Bank*, 116 Mass. 384. It was there held that where a man deposits money in a savings bank in the name of his wife, and has the bank-book made out in her name and delivered to her, he cannot maintain an action against the bank for its refusal to pay the money to him. This was so decided on the ground that there was no contract between the bank and the plaintiff to pay the money to him. In this case there was no evidence that the money was deposited by the wife as the agent of her husband; and the case was distinguished on this ground from the case of *McCluskey v. Provident Institution for Savings*, 103 Mass. 300, where it was held that it was a good defence on the part of the bank to a suit by a wife, that money deposited in her own name was so deposited at her husband's request and for his benefit, on the ground that these facts would defeat the inference of a gift arising from a deposit in the wife's name, and show that she was acting as her husband's agent.

In the case at bar no question of procedure arises. The claimant is properly before the court, having been summoned in under the provisions of the St. of 1894, c. 317, § 33 (Pub. Sts. c. 116, § 31); and the only question is whether the plaintiff or the claimant has the better title to the funds.

A deposit in a savings bank in the name of another is not alone sufficient to prove a gift. *Brabrook v. Boston Five Cents Savings Bank*, 104 Mass. 228. *Sherman v. New Bedford Five Cents Savings Bank*, 138 Mass. 581, and cases cited. *Broderick v. Waltham Savings Bank*, 109 Mass. 149. Nor is the fact that the savings bank book designates the depositor as trustee for another conclusive evidence of the existence of the trust. *Parkman v. Suffolk Savings Bank*, 151 Mass. 218.

While the plaintiff excepted to the ruling given, this point has not been argued, except as it is embraced in the argument relating to the refusal to give the two instructions requested. As we are of opinion that the judge properly refused to rule as requested, the order must be,

Exceptions overruled.

COMMONWEALTH vs. ELIZABETH GAY.

Essex. November 7, 1894. — November 30, 1894.

Present: FIELD, C. J., ALLEN, KNOWLTON, & BARKER, JJ.

Complaint — Name — Evidence — Variance — Question for Jury.

At the trial of a complaint charging the defendant with the illegal sale of intoxicating liquors to one Pierre A. Maguant, a witness for the government testified that he had always heard the purchaser called Peter and never Pierre. Two other witnesses for the government testified that they had never heard any one call him by the name of Pierre, but that he had told them that that was his name. *Held*, that the judge rightly refused to rule that there was a variance, and properly left it to the jury to determine whether his name was Pierre or not.

COMPLAINT, charging the defendant with the alleged illegal sale of intoxicating liquors to one Pierre A. Maguant, at Lynn, on January 27, 1894.

At the trial in the Superior Court, before *Lilley, J.*, one Murchison, a witness for the Commonwealth, among other things, testified that the defendant sold a glass of whiskey to Peter Maguant, and in the course of a conversation between the witness, this defendant, and Maguant, Maguant was called Peter by the defendant, and Maguant responded to that name. Upon cross-examination the witness said he had worked in the same shop with Maguant, and had always heard him called Peter, and had never heard him called by the name of Pierre.

One Wells and one McKenney, witnesses called by the Commonwealth, testified that the name of Maguant was Pierre A. Maguant. Upon cross-examination they testified that they had never heard any one call him by that name, but that Maguant at one time told them his name was Pierre A. Maguant, and that was the only knowledge they had of what the name of Maguant was.

The defendant requested the judge to instruct the jury to return a verdict of not guilty, by reason of a variance, that there was no competent or sufficient evidence to prove that the name of the alleged purchaser of liquor was Pierre A. Maguant, but that the only competent evidence introduced upon the question

of the name was that of Murchison, who testified positively that his name was Peter; and that he was commonly known by the name of Peter.

The judge refused so to rule, but, with appropriate instructions on the subject, left it to the jury to determine whether the name of the alleged purchaser was Pierre A. Maguant or not; and the defendant excepted.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

J. H. Sisk, for the defendant.

W. H. Moody, District Attorney, for the Commonwealth.

FIELD, C. J. We are of opinion that evidence that the person described in the complaint as Pierre A. Maguant had said that this was his name is some evidence that this was his name, or that he was known and called by this name. In *Commonwealth v. Brigham*, 147 Mass. 414, the defendant was indicted for adultery with Albino Jefferds, and he introduced evidence that the true name of this woman was Albina Gervais, and that she was never called or known as Albino Jefferds. The government was permitted to introduce evidence, against the objection of the defendant, that the person described as Albino Jefferds had pleaded not guilty "to a complaint issued from the Central District Court of Worcester, in August, 1887, against Albino Jeffards, for fornication with Joseph Brigham." Upon this objection, this court say: "In determining whether this latter person was rightly named in the indictment, it was competent to show to what name she had answered, and how she had permitted herself to be called. . . . When one answers to a name, it is certainly evidence that such is either his true name or one by which he consents to be known," etc. A declaration by a person that certain words constitute his name is, we think, as clearly evidence that such is his name as answering to that name in pleading to a criminal complaint.

Exceptions overruled.

SAMUEL KNIGHT, executor, *vs.* HENRY P. KNIGHT & others.

Essex. November 8, 1894. — November 30, 1894.

Present: FIELD, C. J., ALLEN, KNOWLTON, & BARKER, JJ

Construction of Will — Absolute Gift to Wife of Testator.

A testator, by his will, gave to his wife one seventh part of the residue of his estate, "to be disposed of as she shall think best, but if any part of her said seventh part shall not be disposed of at the time of her decease then the part of her seventh part remaining undisposed of at her decease shall be equally divided among my said six children," and added that the gift was made to her "in lieu of dower and distributive share of my personal estate." *Held*, that the wife took one seventh part of the residue absolutely, and that it passed to the devisees under her will.

BILL IN EQUITY, filed December 14, 1893, by one of the executors under the will of John Knight, against Edward S. Knight, his co-executor, and others, all children of the testator, to obtain the instructions of the court as to the construction of the fourth article of the will.

The case was heard by *Barker, J.*, and reported for the consideration of the full court on the bill, the answers of the several defendants and certain agreed facts, and was as follows.

John Knight, the testator, died in 1881, leaving a widow, Deborah C. Knight, and six children; namely, Samuel Knight, Henry P. Knight, Mary C. Emerson, Edward S. Knight, Augustus S. Knight, and John C. Knight, of whom the first three were children by a former wife.

By the fourth article of his will, which was duly admitted to probate, he provided that "all the rest and residue of my estate, real and personal, shall be divided into seven equal parts, and six sevenths of the same shall be equally divided among my said six children. And the other one seventh part I give and devise to my said wife, to be disposed of as she shall think best, but if any part of her said seventh part shall not be disposed of at the time of her decease, then the part of her seventh part remaining undisposed of at her decease shall be equally divided among my said six children. The devise and bequest made to

my wife is made to her in lieu of dower and distributive share of my personal estate."

Deborah C. Knight died in 1893, possessed of personal estate consisting in part of stocks and bonds delivered to her by the executors of the will of John Knight, and in part of personal securities purchased by her with money arising from the sale of real estate of the testator taken by her under the fourth clause of the will, and from the sale by the executors of the will of John Knight of personal property likewise paid to her. By her will, which was duly admitted to probate, she devised and bequeathed all the estate, real and personal, which could pass by her will, to her three sons, Edward S., Augustus S., and John C. Knight.

When the bill was filed, certain real and personal estate, forming a portion of the residue of the estate of John Knight, remained undivided, and the prayer of the bill was for the instructions of the court as to whom and in what proportions such residue should be distributed and conveyed.

G. A. Blaney, for Henry P. Knight and others.

E. T. Burley, for other defendants.

FIELD, C. J. We are of opinion that the widow of the testator took the absolute property in the one seventh part of the residue of the real and personal estate given her by the fourth article of the will. The clause to be construed more nearly resembles those construed in *Ide v. Ide*, 5 Mass. 500, *Kelley v. Meins*, 135 Mass. 231, *Joslin v. Rhoades*, 150 Mass. 301, and *Foster v. Smith*, 156 Mass. 379, than in the cases in which it has been held that a life estate was given.

It follows that one seventh part of the residue of the estate of John Knight remaining in the hands of the executors of his estate belongs to the estate of the widow, and a decree should be entered accordingly.

So ordered.

DAVID FOLEY vs. JAMES TALBOT.

Suffolk. November 15, 1894. — December 3, 1894.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Service of Notice of Filing Exceptions.

Under the 31st Rule of the Superior Court a notice of the filing of exceptions left at the office of the attorney of the adverse party in his absence is not duly served unless he actually receives it.

TORT, for the conversion of certain personal property. At the trial in the Superior Court, before *Bond, J.*, the jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

At the hearing on the allowance of the exceptions, the plaintiff moved that the same be dismissed on the ground that notice of the filing thereof had not been duly served upon him or his attorney. The defendant's attorney testified that the notice was left by him in the office of the plaintiff's attorney in his absence; but the plaintiff's attorney deposed that he never received it.

The defendant asked the judge to rule that, if the notice required by law had been left at the office of the attorney of the plaintiff during office hours, the office being then open, within the time required for giving said notice, such notice was duly served.

The judge declined so to rule, and found that notice of the filing of exceptions was not given in accordance with the statute and the rules of the Superior Court, and dismissed the exceptions; to which ruling the defendant excepted.

J. W. Low, for the defendant.

S. D. Charles, for the plaintiff.

ALLEN, J. By Rule 49 of the Superior Court, "All exceptions shall be reduced to writing and filed with the clerk, and notice thereof given to the adverse party," within a specified time. The statute also is to the same effect. Pub. Sts. c. 153, § 8. By Rule 31, "All notices required by or given in pursuance of these rules shall be in writing, and may be proved by an affidavit of the party or his attorney to a copy thereof, and setting forth that

the same was delivered personally to the adverse party or his attorney, or deposited in the post office directed to him, postage prepaid." Under this rule, a notice left at the office of the attorney in his absence is not duly served unless it actually reaches him. Leaving it in his office is not an equivalent for sending it by mail. The rule shows in explicit terms how notices are to be served, and one who departs from the method there pointed out must take the risk of being able to prove that the notice actually came to hand. In the present case, it did not appear whether the notice was left on the attorney's desk, or elsewhere in the office; and the attorney deposed that he never received it. The judge, therefore, might properly refuse to rule as requested, and find that the notice was not duly served.

Exceptions overruled.

PATRICK SHEA vs. GLENDALE ELASTIC FABRICS COMPANY.

Hampden. September 26, 1894. — December 4, 1894.

Present: ALLEN, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Evidence — Remoteness — Other like Facts.

On the question whether the illness of the plaintiff was caused by lead poisoning from inhaling dust containing white lead coming from the rubber thread on which he worked in the defendant's mill, evidence is competent that other persons, some of whom worked at the same time in the same room with the plaintiff under similar conditions, and some of whom worked there under similar conditions a few months before and a few months after him, were ill from lead poisoning; that a former employee of the mill, after working there for three and a half or four months, a short time before the plaintiff was there, was ill and had the same symptoms; and that a physician, at a time which he could not fix exactly, had a number of like cases in patients coming from the same room of the defendant's mill.

TORT, for personal injuries occasioned to the plaintiff by lead poisoning from inhaling dust containing white lead, coming from the rubber thread on which he worked in the defendant's mill.

At the trial in the Superior Court, before *Mason*, C. J., the

jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The material facts appear in the opinion.

J. C. Hammond & H. P. Field, for the defendant.

W. H. Brooks, for the plaintiff.

KNOWLTON, J. The only exception in this case was to the admission of certain testimony on the question whether the plaintiff's illness was caused by lead poisoning from inhaling dust containing white lead, coming from the rubber thread on which he worked in the defendant's mill, or whether it arose from other causes. This question may be divided into two branches; first, the inquiry whether the defendant's mill was a place in which one would be likely or liable to be poisoned by inhaling lead in the form of dust, and secondly, if so, whether the plaintiff was so poisoned. The plaintiff was allowed to introduce evidence to show that other persons who worked at the same time in the same room in the defendant's mill, and under similar conditions, were ill from lead poisoning, and that other persons who worked there under similar conditions a few months before and a few months after were also ill from the same cause. There was also evidence from a physician, who could not fix the time exactly, that he had a number of like cases in patients coming from the same room of the defendant's mill. One Wood was permitted to testify that, after working in this mill three and a half or four months, a short time before the plaintiff was there, he was ill, and had the same symptoms. All this testimony was introduced subject to the same general exception of the defendant.

The question in dispute was whether there was an impalpable poison in the atmosphere of the defendant's mill which would be likely to have a certain effect upon the human body. The most natural way of obtaining the true answer to the question was by inquiring what effects, if any, had been produced upon persons accustomed to breathe this atmosphere. The conditions under which the different persons in the room were exposed were similar, and so far as that factor in the problem is concerned we should expect precisely the same effect. These persons had bodies similar in form and structure, with the same organs, governed by the same laws, and with like susceptibilities. Of course, there were diversities in their previous

experiences and in their condition outside of the mill, and on that account the effects upon the different persons might differ slightly. But, so far as appears, the symptoms of their illness were so distinctive and peculiar as to point almost conclusively to the same cause.

We are of opinion that this evidence tended to show that there was exposure in the defendant's mill which caused the same illness in them all. There was undoubtedly evidence in regard to the symptoms and nature of the plaintiff's illness which is not reported in the bill of exceptions, all of which, presumably, was considered by the presiding justice in determining whether the evidence should be admitted. In deciding questions of this kind much depends on the circumstances of each particular case, and much is therefore left to the discretion of the judge. To express this conclusion in another way, whenever the competency of evidence depends on the view to be taken of any doubtful question of fact which appears of record, or on facts and evidence not reported, this court will not attempt to revise the decision of the trial judge. *Commonwealth v. Gray*, 129 Mass. 474. *Hunt v. Lowell Gas Light Co.* 8 Allen, 169, 171. *Robinson v. Fitchburg & Worcester Railroad*, 7 Gray, 92, 95.

In *Baxter v. Doe*, 142 Mass. 558, which was an action for damages against the owner of a vessel for neglect to furnish proper food to a sailor, evidence that other members of the crew exposed to similar conditions were sick at about the same time was held to be competent. *Hunt v. Lowell Gas Light Co.* 8 Allen, 169, and 1 Allen, 343, was an action for negligently suffering gas to escape into a house occupied by the plaintiff, whereby he was made sick, and it was decided that evidence of the sickness of other persons in the same house, exposed to the same conditions, might be introduced by the plaintiff. Similar principles were involved in the judgments in *Hodgkins v. Chappell*, 128 Mass. 197, *Brierly v. Davol Mills*, 128 Mass. 291, and *Reeve v. Dennett*, 145 Mass. 23. See also *Crocker v. McGregor*, 76 Maine, 282; *Boyce v. Cheshire Railroad*, 43 N. H. 627; *Darling v. Westmoreland*, 52 N. H. 401; *Cleveland v. Grand Trunk Railway*, 42 Vt. 449; *House v. Metcalf*, 27 Conn. 631; *Field v. New York Central Railroad*, 32 N. Y. 339; *Grand Trunk Railroad*

v. *Richardson*, 91 U. S. 454; *District of Columbia v. Armes*, 107 U. S. 519, 524; *Brown v. Eastern & Midlands Railway*, 22 Q. B. D. 391, 393.

The objection that such testimony is likely to lead into collateral inquiries, in order to establish its force or to show its weakness, is one that may be made to almost all circumstantial evidence, and which addresses itself to the sound discretion of the court. If it seems probable that a line of inquiry will lead into side issues not anticipated by the parties, and which will be likely to distract and confuse the jury and unreasonably protract the trial, the questions should be excluded; but if on proofs of identity or likeness of conditions a fact will have important probative force, it should not be excluded if its relation to the case can easily be shown.

It must be assumed in this case, in the absence of anything to show the contrary, that there was no great practical difficulty in presenting and considering the evidence which was objected to, and that the presiding justice found that the similarity of conditions was so clearly and so easily shown as to make the testimony proper.

Exceptions overruled.

COMMONWEALTH vs. TIMOTHY CREADON.

Bristol. October 23, 1894. — December 5, 1894.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

Assault with Intent to commit Rape.

A defendant can be convicted on an indictment charging an assault with intent to commit rape, if the evidence satisfies the jury that his crime was rape.

KNOWLTON, J. The only question presented in this case is whether the defendant could be convicted on an indictment charging an assault with intent to commit rape, if the evidence satisfied the jury that his crime was rape.

Under Pub. Sts. c. 214, § 18, one indicted for a felony may be acquitted of part of the offence charged and convicted of the

residue, if that residue constitutes a punishable offence substantially charged in the indictment. It has repeatedly been held that a charge of rape includes a charge of assault, and that on an indictment for rape one may be convicted of an assault. *Commonwealth v. Drum*, 19 Pick. 479. *Commonwealth v. Dean*, 109 Mass. 349. *Commonwealth v. Squires*, 97 Mass. 59.

On similar grounds it has been held in many cases that one charged with a crime may be convicted of it, if the evidence shows that he was guilty of a greater crime which includes that charged in the indictment. Thus, one may be convicted on an indictment charging him with the crime of manslaughter, when the evidence shows that he is guilty of murder. For the unlawful homicide which constitutes the crime of manslaughter is proved as well if the killing was with malice aforethought as if it were in the heat of sudden passion. Murder is unlawful homicide with the element of malice superadded. *Commonwealth v. M'Pike*, 3 Cush. 181. *Commonwealth v. Burke*, 14 Gray, 100. *Commonwealth v. Bakeman*, 105 Mass. 53, 61. *Commonwealth v. Walker*, 108 Mass. 309. *Commonwealth v. Hogarty*, 141 Mass. 106.

The instructions requested were rightly refused.*

Exceptions overruled.

H. J. Carroll & H. H. Pratt, for the defendant.

L. E. White, District Attorney, for the Commonwealth.

* The defendant requested the judge to instruct the jury that, if they should find upon all the testimony that the full act of copulation was had, either with or without the consent of the girl, there was a variance between the allegation in the indictment and the proof, and the defendant could not be convicted; and if they should find that the story of the girl was true, that there was a full entrance and penetration of the vagina, the defendant could not be convicted.

PETER BAKER vs. HENRY L. TIBBETTS.

Worcester. October 3, 1894. — January 1, 1895.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Personal Injuries — Conduct leading Another into Trap — Negligence — Principal and Agent.

In an action for personal injuries occasioned by an explosion in the basement of a building, it appeared that the building had been conveyed by A. to the defendant as trustee for A.'s creditors; that the defendant, by his agent B., had made a written lease of the building to C., who had made an agreement for a sublease of the basement to D., to take effect on a certain day; that in the basement were engines, boilers in a cement-lined pit, and in the boilers was some bisulphide of carbon; that, at the time of the lease to C., B. agreed to remove everything in the basement, except a certain engine and a shaft, and retained a key to the basement; and that later B. asked that certain things might remain there, and C. assented if D. did not object. There was evidence that, before the sublease took effect, D. and the plaintiff, who was interested in D.'s business, went to B., just outside the basement, and asked him what things he wanted to have remain; and that B. answered, "Come in and I will show you." It further appeared that before this time B. had removed some of the things, and had drawn off some of the bisulphide of carbon, but in the process some of it had been spilled upon the bottom of the pit; and that the parties went into the basement, and an explosion happened, which according to the plaintiff's testimony was caused by his accidentally knocking a piece of iron into the pit and making a spark. The plaintiff and D. denied that they had been told by any one of the presence of the explosive. *Held*, that there was evidence sufficient to be submitted to the jury upon the question whether B., in his alleged invitation to the plaintiff, was acting on behalf of the defendant, and within the scope of his authority.

HOLMES, J. This is an action of tort for personal injuries, seeking to charge the defendant on the ground that by his agent he invited the plaintiff into a place of hidden danger, that is to say, a place where there was a dangerous explosive unknown to the plaintiff, and thereby led him into a trap. The place in question was the basement of a building, which had been conveyed by one Aldrich to the defendant as trustee for Aldrich's creditors. The defendant by his agent Stearns had made a written lease of the building to Sherman, and Sherman had made an agreement for a sublease of the basement to Ryan, to take effect on October 1, 1892. In this basement were engines, boilers in a cement-lined pit, and so forth, and in the

boilers was some bisulphide of carbon, the explosive mentioned above. At the time of the lease to Sherman, Stearns agreed to remove everything in the basement except a Fitchburg engine and a large shaft, and retained a key to the basement. Later, Stearns asked that certain things might remain there. Sherman assented if Ryan did not object. There was evidence that, on September 19, Ryan and the plaintiff, who was interested in Ryan's business, went to Stearns, just outside the basement, and asked him what things he wanted to have remain, and that Stearns answered, "Come in, and I will show you." Before this time Stearns had removed some of the things, and had drawn off some of the bisulphide of carbon, but in the process some of it had been spilled upon the bottom of the pit. The parties went into the basement, and an explosion happened. According to the plaintiff's testimony, it was caused by his accidentally knocking a piece of iron into the pit, and making a spark. The plaintiff and Ryan denied that they had been told by any one of the presence of the explosive. On the other hand, there seems to be no reasonable doubt that Sherman knew as much as Stearns did.

Assuming that to leave any of the bisulphide of carbon in the pit was negligent, in the only sense in which it could be so as towards the plaintiff, that is to say, that it was conduct manifestly endangering the safety of those on the premises without warning; still, if Sherman, the person having sole control of the premises, knew the precise condition of things and appreciated the danger, the defendant would not necessarily be answerable to persons whom Sherman might see fit to invite there. *Mellen v. Morrill*, 126 Mass. 545. *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47. The ground on which the defendant must be held in this case, if at all, is that he invited and induced the plaintiff to enter a place known to the defendant to be dangerous, without warning the plaintiff.

The defendant puts some reliance on the fact that by an earlier recorded deed Aldrich had conveyed the premises to a third person, and it is suggested that the boilers and bisulphide of carbon had been left on the premises by a former tenant, and never had belonged to Aldrich. These facts, if true, are not a defence by themselves. If the defendant assumed to deal with

the land and chattels, if he was seised of the one and took control of the other, his liability would not be prevented by a defect in his title. *Earle v. Hall*, 2 Met. 353, 358-360. *Learoyd v. Godfrey*, 138 Mass. 315, 323. Neither does the fact that he held the title to the property as a trustee reduce him to the position of an intermediate agent between the real principal and the person actually causing the damage, as in *Stone v. Cartwright*, 6 T. R. 411. See *Shepard v. Creamer*, 160 Mass. 496. The only question of law is whether Stearns, in his alleged invitation to the plaintiff, was acting on behalf of the defendant, and within the scope of his authority.

We have come to the conclusion that there was evidence sufficient to be submitted to the jury. It is admitted that Stearns had authority from the defendant to make the lease. As incident to that authority, he might agree on behalf of the defendant to remove from the premises chattels not included in the lease, whether they belonged to the defendant or not. But with regard to the title of the defendant to the things which were to be removed, it is to be noticed that the deed which he accepted purported to convey them, and that there is ground, therefore, for the argument that, rightly or wrongly, he assumed to deal with them as his own. Again, even if technically the property in question passed by the lease, so that an oral agreement made at the same time could not be enforced, still, if in fact the parties to the lease were carrying out the oral understanding, it would be going too far to say that the want of legal effect in the understanding carried with it a want of authority from the defendant to Stearns to carry it out. The jury might find that Stearns had authority to except from the lease, and on behalf of the defendant to remove, the articles, or to leave them on the premises, and that he was proceeding to arrange about them when the accident happened. If so, the fact that he did it in a way not technically sufficient, in case objection had been made by the tenant, would not be a defence, inasmuch as the tenant did not object but assented to the arrangement. If the jury should find the state of facts which we have imagined, and of which there was some evidence, they might find that the invitation to the plaintiff was reasonably incident to settling what must be carried away and what must be left on the premises, and in that event the plaintiff's right to recover would be established.

The jury have found, in answer to questions propounded to them, that the explosion was caused by the falling of a piece of iron or other heavy substance into the pit, and that it was caused by the ordinary walking about in the basement of the plaintiff and others. They also have found the amount of the damages. By the terms of the report, the issues already determined are not to be retried.

Case to stand for trial.

W. Thayer, (H. W. Cobb with him,) for the plaintiff.

J. C. Burke, for the defendant.

GENEVIEVE M. CLOUTIER, administratrix, *vs.* GRAFTON AND UPTON RAILROAD COMPANY.

Worcester. October 3, 1894. — January 1, 1895.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Loss of Life — Railroad — Negligence — Evidence.

In an action against a railroad corporation, under the employers' liability act, St. 1887, c. 270, for causing the death of C., it appeared that he was run down and killed by the defendant's engine while standing on the main track of the railroad with his back to the approaching engine, working at a coal car which was on the same track and which was run into; and that the switch had been set so as to send the engine on to a loop track, and the head brakeman changed the switch with the knowledge of the engineer. The defendant put in evidence that C. had orders to remain at the switch until the train had gone on its way by the loop track, and that he had told the engineer that he would do so. This evidence was disputed; and, in corroboration of it, evidence was offered that until the accident C. always had been there. *Held*, that the evidence so offered should have been admitted.

In an action for causing the death of C., if a witness for the defendant, having testified on direct examination to a conversation with C. after the accident, on cross-examination concerning it testifies to a similar conversation at a later date, the plaintiff may contradict the later conversation in rebuttal.

HOLMES, J. This is an action under the employers' liability act, St. 1887, c. 270, to recover for the death of the plaintiff's intestate and husband, one Cloutier, who was run down and killed on the defendant's track by its engine. At the time of the accident Cloutier was standing on the main track with his back to the approaching engine, working at a coal car which was

on the same track, and which was run into. The case comes before us on exceptions to the refusal of the judge to take the case from the jury and to give other rulings asked for by the defendant, and also to the exclusion of certain evidence.

As the exception to the exclusion of evidence must be sustained, it need not be considered how far this case can be distinguished from *Lynch v. Boston & Albany Railroad*, 159 Mass. 536, and the like. It is enough to say that the court are not prepared to deny that it is distinguishable, in view of the presence of the car upon the track, and the evidence that the switch had been set so as to send the engine on to a loop track, and that the head brakeman changed the switch with the knowledge of the engineer. The facts may have warranted Cloutier in assuming that an engine would not run where a collision would be the manifestly necessary result. See *Maguire v. Fitchburg Railroad*, 146 Mass. 379. If so, the court are of opinion that the jury might find that the only negligence of Cloutier, if any, was in not having the switch watched, and that the running of the engine on the main track was also negligent, and nearer to the accident. *Pierce v. Cunard Steamship Co.* 153 Mass. 87. It is not denied that, if the foregoing propositions are correct, this case is within St. 1887, c. 270. See *Davis v. New York, New Haven, & Hartford Railroad*, 159 Mass. 532, 534.

The defendant put in the evidence of different witnesses that Cloutier had orders to remain at the switch until the train had gone on its way by the loop track, and that he had told the engineer that he would do so. This evidence was disputed. In corroboration of it, evidence was offered that until the accident Cloutier always had been there. It is objected that the questions put were leading; but we think it plain that the evidence was excluded on general grounds, and not for form. This being so, we are of opinion that the exclusion was wrong. The habit of Cloutier in such a matter tended to show, by admission, what his duty was; or, putting it at the lowest, the fact was a circumstance to be considered by the jury in determining what the engineer reasonably might expect, as bearing on the question of his negligence. See *Readman v. Conway*, 126 Mass. 374; *Davis v. New York, New Haven, & Hartford Railroad*, 159 Mass. 532,

535. We cannot say that all evidence as to the duty of Cloutier to watch the switch was immaterial, notwithstanding its bearing on the question of his care, for we cannot say, as matter of law, that if the jury had found that there was such a duty they were bound to find that there was later negligence on the part of the defendant. They might have found so, but we cannot say that they might not have found that Cloutier had invited and led the train into a position where it was too late to stop when the danger was noticed. See *Tyler v. Old Colony Railroad*, 157 Mass. 336, 340.

A witness for the defendant, having testified on direct examination to a conversation with Cloutier after the accident, on cross-examination concerning it testified to a similar conversation at a later date. The plaintiff was allowed to contradict the later conversation in rebuttal. The admission of this evidence was excepted to. This exception must be overruled. The evidence on cross-examination was closely connected with the testimony in chief; it was material, and the contradiction of it tended to discredit the witness. *Commonwealth v. Bean*, 111 Mass. 438. *Fries v. Brugler*, 7 Halst. 79. *Hogan v. Cregan*, 6 Rob. (N. Y.) 138, 150. *People v. Cox*, 21 Hun, 47, 52. *State v. Patterson*, 2 Ired. 346, 353. Wharton, Ev. § 552.

Exceptions sustained.

F. A. Gaskill, for the defendant.

F. P. Goulding, (*F. L. Dean* with him,) for the plaintiff.

HECTOR C. TOUPIN vs. W. SCOTT PEABODY.

Essex. November 7, 1894. — January 1, 1895.

Present: FIELD, C. J., ALLEN, KNOWLTON, & BARKER, JJ.

Landlord and Tenant — Lease — Statute — Notice to Purchaser.

A lease of premises for the term of five years, containing a provision that the "lessee is to have the privilege of renewing this lease upon the same terms for the further term of five years," is "a lease for more than seven years from the

making thereof," within the meaning of Pub. Sts. c. 120, § 4, which, if not recorded as therein required, will, so far as it purports to give the lessee the right to a second term of five years, be invalid as against a purchaser of the premises without actual notice of the lease.

A lease of premises for the term of five years contained a provision that the lessee was to have the privilege of renewing the lease upon the same terms for the further term of five years. Before the first term expired the lessor conveyed the premises to a third person. The purchaser knew that the lessee was in possession of the premises as a tenant, but he was informed by the lessor, and believed, that the lessee had no written lease, and it was not until two months after the purchase that he first learned that the lessee had a written lease and was informed of its terms. *Held*, upon a bill in equity by the lessee against the purchaser for specific performance of the covenant for renewal in the lease, that the purchaser was not chargeable with actual notice of the lease.

BILL IN EQUITY, filed in the Superior Court on September 5, 1893, for specific performance of a covenant for renewal contained in a lease of certain premises in Haverhill. The case was submitted upon agreed facts, in substance as follows.

Hannah Driscoll, being the owner in fee of certain land in Haverhill, upon which was a building, the lower story of which was used for shops and the upper stories for dwelling purposes, and occupied by several different tenants, executed and delivered, on August 20, 1888, a lease of the lower story thereof to the plaintiff, containing, after the habendum, (which was for the term of five years from September 1, 1888,) the following clause: "And said lessee is to have the privilege of renewing this lease upon the same terms for the further term of five years."

The plaintiff entered under his lease, and continued to occupy the demised premises down to the filing of this bill, paying Driscoll the rent reserved in the lease as long as she continued to be the owner of the reversion. The land, with the building thereon, was conveyed by Driscoll to the defendant and William H. Floyd, by deed dated December 9, 1891, for a valuable consideration. The deed was duly recorded, and contained full covenants against all encumbrances, except certain mortgages not material to be stated. At the times of the negotiation for the purchase and of the conveyance to them, the defendant and Floyd knew that the plaintiff was in possession of the demised premises, and was occupying them as a tenant of Driscoll for the purposes of a drug store, but they were informed by Driscoll, and believed, that the plaintiff and the other tenants had no

written leases. The plaintiff did not inform the defendant or Floyd of his lease, and neither the defendant nor Floyd made any inquiry of the plaintiff as to the terms of his tenancy. Before the conveyance was made, the defendant procured a search of the title to be made by a competent conveyancer, who pronounced the title to be good.

Two months after the conveyance by Driscoll to them, the defendant and Floyd learned for the first time that the plaintiff had a written lease of the premises occupied by him, and were informed of the terms thereof. The plaintiff continued until the expiration of the lease to pay to the defendant and Floyd the amount of rent reserved in the lease at the times therein appointed for its payment, claiming to pay the same under and by virtue of the terms of the lease. The defendant and Floyd accepted the amount of the rent paid by the plaintiff, protesting, however, that it was not received under the provisions of the lease, and that by receiving the same they did not intend in any way to confirm or recognize the lease. It is admitted that they have not ratified the lease, nor admitted it to be valid against them.

Prior to the bringing of this bill, Floyd conveyed to the defendant his interest in the property so conveyed to them by Driscoll, and the defendant is now the sole owner of the fee. The plaintiff duly gave written notice to the defendant of his intention to avail himself of the privilege of renewal contained in the lease, and demanded a lease for the additional term of five years. The defendant has refused to renew the lease, has given the plaintiff notice to quit the premises, and has begun proceedings at law to recover the premises and to eject the plaintiff therefrom.

The plaintiff, upon a complaint charging him with maintaining a nuisance by using the premises demised in the lease for the illegal sale and keeping of intoxicating liquor, between April 17, 1890, and June 1, 1890, was duly found guilty and sentenced at the October term, 1890, of the Superior Court. Driscoll, after judgment upon the complaint, continued to receive the rent from the plaintiff at the times appointed in the lease for its payment, and never took any proceedings to avoid the lease. Neither the defendant nor Floyd has taken any proceedings to avoid the

lease by reason of such conviction, except by an allegation in respect thereto in the answer in this cause.

The lease was never recorded in the registry of deeds.

The case was reserved by *Dunbar, J.*, upon the pleadings and agreed facts, for the consideration of this court.

W. H. Moody, for the plaintiff.

B. B. Jones, for the defendant.

BARKER, J. Assuming that the instrument of August 20, 1888, is not a demise for two successive terms of five years each, we are nevertheless of the opinion that it is "a lease for more than seven years from the making thereof," within the meaning of Pub. Sts. c. 120, § 4, which enacts that "A conveyance of an estate in fee simple, fee tail, or for life, or a lease for more than seven years from the making thereof, shall not be valid as against any person other than the grantor or lessor and his heirs and devisees, and persons having actual notice of it, unless it is recorded in the registry of deeds for the county or district in which the real estate to which it relates is situated." The statute is part of our system of registration of titles to land, and the general purpose for which it was established was to enable a purchaser of land to rely upon the information furnished him by the registry of deeds, if he has no actual notice of some different state of facts as to the title. See *Dole v. Thurlow*, 12 Met. 157; *Earle v. Fiske*, 103 Mass. 491.

The intention of the particular clause in question is that a *bona fide* purchaser without actual notice may rely with certainty upon the fact that no instrument which does not appear of record, and of which he does not have actual notice, can give a tenant for years the right to any longer term than for seven years from the making of the instrument. The statute is a remedial one, and upon the principles of construction applicable to such statutes its general intention and purpose are to be given due effect, and cases which are clearly within its general intention are to be governed by it. See *M^cMechan v. Griffing*, 3 Pick. 149; *Woodbury v. Freeland*, 16 Gray, 105; *Brown v. Pendergast*, 7 Allen, 427; *Johnson v. Gibbs*, 140 Mass. 186; *Atcheson v. Everitt*, Cowp. 382; *Winchester's case*, 3 Co. Rep. 1, 4.

The general intention of the section in which the clause is found is, that no instrument operating to create an interest in

land greater than an estate for seven years shall, unless duly recorded, be valid as against any person other than the one who makes it or his heirs or devisees, unless such person has actual notice of the instrument. In expressing this intention, conveyances in fee simple, fee tail, and for life are first specified, and the enumeration closes with the words, "or a lease for more than seven years from the making thereof." In respect of estates for years, the term during which the land which a purchaser had bought could be kept from his possession by the holder of an unrecorded lease was the important matter to be fixed by the statute, as by his conveyance the purchaser acquired the right to rent and the other rights of the lessor. In fixing upon seven years from the making of the lease as the length of a term which might be valid as against a *bona fide* purchaser without actual notice, the Legislature intended that to be the utmost which a lessee for years under an unrecorded instrument could claim as against such a purchaser, whether the instrument demised directly a longer term, or provided for its indirect creation by an agreement for renewal at the lessee's option. A lease for five years, with the right to have a renewal for five more, is as much within the mischief which the statute seeks to remedy as a lease for a term of ten years, and the reasons for requiring the latter to be recorded apply equally to the other, so far as the renewal term is concerned.

We do not decide whether an instrument which makes a present demise for a term of seven years or less, and which provides for a further term which with the present demise will exceed seven years from the making of the instrument, either by way of a new lease to be made by the lessor or by the effect of the lessee's mere continuance in possession after the expiration of the first term, if not recorded, is wholly void as to a *bona fide* purchaser without actual notice, or whether it may be good for the first term of seven years or less.

It is enough for the purposes of this case to hold that as to any extension, or second term, or agreement for renewal, which will carry the possession of the lessee to more than seven years from the making of the instrument, every instrument which confers an estate for years is within the meaning of the statute. The instrument on which the plaintiff relies was of this nature,

and so far as it purported to give him the right to a second term of five years it was invalid as against a purchaser without actual notice.

The plaintiff contends that it may well be claimed that the defendant had actual notice of the lease. But while it appears from the agreed facts that the defendant knew that the plaintiff was in possession of the drug store as a tenant, it also appears that the defendant was informed and believed that the plaintiff had no written lease, and that it was not until two months after the purchase that the defendant first learned that the plaintiff had a written lease, and was informed of its terms. It is well settled that facts sufficient to put a purchaser upon inquiry are not sufficient to affect him with actual notice of an unrecorded instrument within the meaning of the language of the statute. *Pomroy v. Stevens*, 11 Met. 244. *Parker v. Osgood*, 3 Allen, 487. *Lamb v. Pierce*, 113 Mass. 72. *Keith v. Wheeler*, 159 Mass. 161. Upon this branch of the case the only legitimate inference from the agreed facts is that the defendant did not have actual notice of the lease.

Nor can the plaintiff rely upon the case of *Cunningham v. Pattee*, 99 Mass. 248, in which it was held that, in equity, one who purchases an estate knowing it to be in possession of a tenant is bound to inquire into the nature of the tenant's interest, and is affected with notice of its extent, and, if the tenant has a written lease, with notice of that fact and of the contents of the lease, including a covenant to renew. The clear distinction between that case and the present is, that in *Cunningham v. Pattee* the original term and the extension were together for less than seven years, and the statute now under consideration had no application. As the statute applies here, we must give it the same force in equity as at law, with the result that, as the defendant had no actual notice of the lease, it is not valid as against him either in equity or law.

Our view of the effect of the statute makes it unnecessary to consider the question whether the plaintiff's conviction of the offence of maintaining a common nuisance in the drug store during a portion of the first term of his tenancy ought to preclude him from maintaining a bill in equity for specific performance of the agreement for renewal.

The case was reserved upon the pleadings and the agreed facts for the consideration of this court in banc. Let the bill be dismissed, with costs. *So ordered.*

THOMAS B. PARKER & others vs. ROCHESTER GERMAN
INSURANCE COMPANY.

Essex. November 7, 1894. — January 1, 1895.

Present: FIELD, C. J., ALLEN, KNOWLTON, & BARKER, JJ.

Fire Insurance — Power of Special Agent to vary Condition of Policy — Oral Contract of Insurance.

An agent of an insurance company, to whom the company had intrusted blank policies of the Massachusetts standard form, signed by the president and secretary, with authority to countersign and issue such policies, "and by writing indorsed thereon to renew any of such policies, or to vary the risk therein," and providing that all of his powers are to be exercised subject to the rules and regulations of the company, "and, when provision is made therefor in such policy in the manner provided therein," has no authority to give an oral assent to a removal of property insured by a policy containing a condition requiring the written or printed assent of the company to such removal.

A count upon an oral contract to insure property in a place to which it has been removed during the existence of a policy of insurance thereon is not sustained by proof of an agreement to transfer the policy so as to cover the property in the new place.

CONTRACT, in two counts. The first count was upon a policy of insurance for \$1,000, issued by the defendant, against loss by fire on certain property of the plaintiffs in Lynn; and the second count was upon an oral contract of insurance on the same property. Trial in the Superior Court, before *Richardson, J.*, who, at the defendant's request, ruled that there was no evidence to sustain the second count; and ordered a verdict for the defendant upon that count. The defendant also requested the judge to rule that the plaintiffs could not recover upon the first count; but the judge declined so to rule. The jury returned a verdict for the plaintiffs on the first count; and the judge reported the case for the determination of this court. If the ruling as to the first count was correct, judgment was to be entered for the plaintiffs on the verdict; if the ruling was wrong, judgment was to

be entered for the defendant upon the first count. If the ruling upon the second count was correct, judgment was to be entered for the defendant upon that count; but if the ruling was erroneous, the verdict upon the second count was to be set aside, and the case to stand for trial upon that count, unless the verdict upon the first count was sustained. The material facts appear in the opinion.

H. F. Hurlburt, (*E. T. McCarthy* with him,) for the plaintiffs.

W. H. Niles, for the defendant.

ALLEN, J. By St. 1887, c. 214, § 60, which was in force at the time of issuing the plaintiffs' policy, a standard form of policies of insurance against fire was provided to which insurance companies were required to conform, with certain exceptions not material here. The plaintiffs' policy was in this standard form, and it contained the following provision: "This policy shall be void . . . if the insured now has or shall hereafter make any other insurance on the said property without the assent in writing or in print of the company, or if, without such assent, the said property shall be removed, except that, if such removal shall be necessary for the preservation of the property from fire, this policy shall be valid without such assent for five days thereafter." No such necessity for a removal existed; but the property was removed to another building without the assent in writing or in print of the company. The plaintiffs rely, however, upon an oral agreement made by the defendant's agents to transfer the policy so that it would cover the property after its removal, and the jury by its verdict has found that such oral agreement was made. The first question is, whether the policy can be saved in this way; and this depends on the extent of the agents' real or apparent authority.

The agents held a written power of attorney which authorized them "to receive proposals for insurance against loss or damage by fire in Lynn and its vicinity, to fix rates of premium upon the same, to receive such premiums, and to countersign policies of insurance when signed by the president and attested by the secretary of said company, and issue the same upon such proposals therefor, and by writing indorsed thereon to renew any of such policies, or to vary the risk therein, or to permit the assured in any such policy to convey the property insured therein and assign said policy to the person to whom such conveyance is

made ; but all powers of said agent are to be exercised subject to and in accordance with the rules and regulations of said company, and such instructions as it may from time to time give, and, when provision is made therefor in such policy, in the manner provided therein." One of the agents testified that they held policies of the defendant company signed in blank by its president and secretary, and had authority to fill out the blanks, and to countersign the policies ; and they took risks upon their own judgment, fixed rates, issued policies before submitting the risks to the company, and had a right to transfer policies from one place to another without consulting with the company. He also testified that a clerk employed by them had similar authority as to making transfers ; but we need not consider whether the agents' authority in this respect could be deputed by them to a clerk, no question of this kind having arisen at the trial.

If in issuing a policy the company itself had wished to dispense with the provision as to a removal of the property insured, or any other provisions contained in the standard form, the statute provided as follows: "No fire insurance company shall issue fire insurance policies on property in this Commonwealth, other than those of the standard form herein set forth, except as follows: . . . Seventh, A company may write upon the margin or across the face of a policy, or write or print in type not smaller than long primer upon separate slips or riders to be attached thereto, provisions adding to or modifying those contained in the standard form ; and all such slips, riders, and provisions must be signed by the officers or agent of the company so using them." St. 1887, c. 214, § 60. A policy would be binding upon the company though issued in violation of the foregoing provision ; St. 1887, c. 214, § 105 ; but the various provisions respecting the standard form of policies are significant as bearing upon the extent of the agents' authority. The policies signed in blank by the defendant's president and secretary, which were in the agents' possession, were no doubt in this standard form. The report contains no intimation to the contrary. There is nothing to show that the agents had any authority to vary the standard form ; but if they had, it would seem probable that they could only do so by inserting provisions or attaching slips in the manner prescribed by the statute. And as their authority

in respect to issuing policies was thus limited, their subsequent assent to a removal of the property, if they were authorized to give such assent, as no doubt they were, must be expressed in the same manner.

Accordingly, in two recent cases it has been said that even a general agent, with full authority, could not waive the express requirement of a writing in a case like this. *Kyte v. Commercial Union Assurance Co.* 144 Mass. 43. *Putnam Tool Co. v. Fitchburg Ins. Co.* 145 Mass. 265. See also *Porter v. United States Ins. Co.* 160 Mass. 183; *Smith v. Niagara Ins. Co.* 60 Vt. 682; *Tarbell v. Vermont Ins. Co.* 63 Vt. 53. In the present case, the agents had not full general authority, but their authority was limited; and it did not enable them to give a valid oral assent to the removal of the property.

It might, however, be suggested that the agents orally agreed to give a written assent in the future to the removal of the property, and that such oral agreement is binding upon the defendant. This position, if tenable, would to a great extent do away with the protection and safeguards which the requirement of a writing was designed to secure. There is nothing to show that the agents had authority to enter into such oral agreement in behalf of the company, though perhaps they might themselves be bound thereby.

It might further be suggested that the agents could by indirection evade the provision requiring a written assent to the removal; that is, that they might consent to a cancellation of the policy, and then agree orally to issue a new policy to the plaintiffs upon their property in the place to which it had been removed. Whether the agents had power in any case to bind the defendant by an oral agreement to issue a policy, we need not inquire; but if they had, it does not follow that they could also bind the defendant by an oral assent to the removal of the property. If direct authority to do a certain thing is denied, it is not to be inferred or implied because by possibility substantially the same result may be reached by indirection.

The plaintiffs contend that there was evidence for the jury of an oral contract to insure their property in the place to which it was removed. The presiding justice rightly ruled that there was no evidence to sustain this view. The testimony is clear

and decisive to show that what the plaintiffs or the agents talked about was the transfer of the existing policies so as to cover the property in the new place.* No question arises, therefore, as to the agents' power to bind the defendant by such oral contract.

We are therefore forced to the conclusion that, according to the terms of the report, the entry must be,

Judgment for the defendant.

BENJAMIN UPHAM vs. CITY OF SALEM.

Essex. November 7, 1894. — January 1, 1895.

Present: FIELD, C. J., ALLEN, KNOWLTON, & BARKER, JJ.

Personal Injuries — Defective Highway — Evidence.

In an action against a city for personal injuries occasioned by falling upon the sidewalk of a street, if the plaintiff contends, and the defendant denies, that at the time of the accident there were ridges of ice upon the walk and depressions in the walk of such a nature as to cause water flowing thereon from the adjoining land to accumulate in such depressions and freeze, evidence that at various times during the same season and before the accident water had been seen coming from the adjoining land, and ridges of ice had been formed upon the walk, and that upon many occasions during the three months before the accident, when the sun shone or it was thawing weather, water ran from the adjoining land upon the walk and froze there, is competent to show that there was such a condition of things that ice was liable to form on the sidewalk.

TORT, for personal injuries occasioned to the plaintiff by an alleged defect in a highway in the defendant city. At the trial in the Superior Court, before *Hammond, J.*, the jury returned a verdict for the plaintiff; and the defendant alleged exceptions to the admission of certain evidence, the nature of which appears in the opinion.

F. L. Evans, for the defendant.

J. W. Porter & H. P. Moulton, for the plaintiff.

BARKER, J. The only questions argued by the defendant relate to the admission of evidence offered by the plaintiff and

* The evidence upon this point was that one of the plaintiffs said to one of the defendant's agents, "We have hired the building opposite, and we shall want you to transfer our policies there so as to cover us"; and he replied, "Very well, send your policies over when you get ready and I will cover you."

admitted under the defendant's exception. The plaintiff was injured by falling upon a sidewalk, and he contended that at the time of the accident there were ridges of ice upon the walk, and that, while the walk was of no unusual slope, the situation and slope of the land adjoining the street were such as to cause water to flow upon the walk from the adjoining land, and that there were depressions in the walk of such a nature as to cause the water to accumulate there instead of running off. The defendant contended that there were no such depressions, and that at the time of the accident the walk was substantially free from snow and ice, and was reasonably safe and convenient for travel.

It was ruled at the trial, that ice formed by water thus coming upon the sidewalk would not of itself constitute a defect; but that in addition it would be necessary, either that the ice should be rough, or that there should be a depression or depressions in the walk in which the water had collected and frozen, in order to make the ice a defect. The defendant does not complain of these rulings; and it is plain that the question of fact to which the evidence excepted to was addressed was whether there was upon the walk at the time of the accident ice in ridges, or smooth ice due to the presence in the walk of depressions which had caused water to accumulate there and become ice instead of running off.

The presence of ridges of ice or of smooth ice thus formed was asserted by the plaintiff, and denied by the defendant. The evidence excepted to was, in substance, the testimony of several witnesses, who testified that at various times during the same season, and before the accident, they had seen water coming from the adjoining land upon the walk, and had found ridges and masses of ice upon the walk; and that when the sun shone, or it was thawing weather, water from the adjoining land froze into ice upon the walk many times during the three months before the accident. This testimony was admitted by the presiding justice for the purpose of showing that there was such a condition of things that ice was liable to form on the sidewalk.

The defendant contends that such evidence was competent for no other purpose than to show that the city might have had notice, or might have remedied the defect, by reasonable care

and diligence, but that it was not competent to prove the existence of a defect at the time of the accident.

While it would not be competent to show previous similar defects, either for the purpose of showing the shape or dimensions of the ice at the time of the accident, or for the purpose of founding an argument that the walk was defective at that time because the defendant had suffered it to be out of proper repair on other occasions, yet as the fact whether there were deposits of ice of a particular character upon the walk when the plaintiff fell was in controversy, and there was direct evidence that such deposits were then there, the evidence excepted to was admissible for the purpose of corroborating such direct evidence as tending to show that the conformation of the walk and its situation with reference to adjacent land were such as habitually to induce the formation of such deposits of ice upon the walk. See *Stone v. Hubbardston*, 100 Mass. 49, 57; *Berrenberg v. Boston*, 137 Mass. 231. In the case last cited, the reason why in such circumstances such evidence is admissible is said to be that "a usual and habitual state of things, dependent upon natural causes, and constantly producing the same results, has a legitimate tendency to show that the result was in existence at a particular time."

We find no indication in the bill of exceptions that the jury were allowed to make any improper use of the evidence thus admitted, and no error in this respect is to be inferred.

Exceptions overruled.

JOHN OLSON vs. EDWIN KEITH.

Plymouth. November 13, 1894. — January 1, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

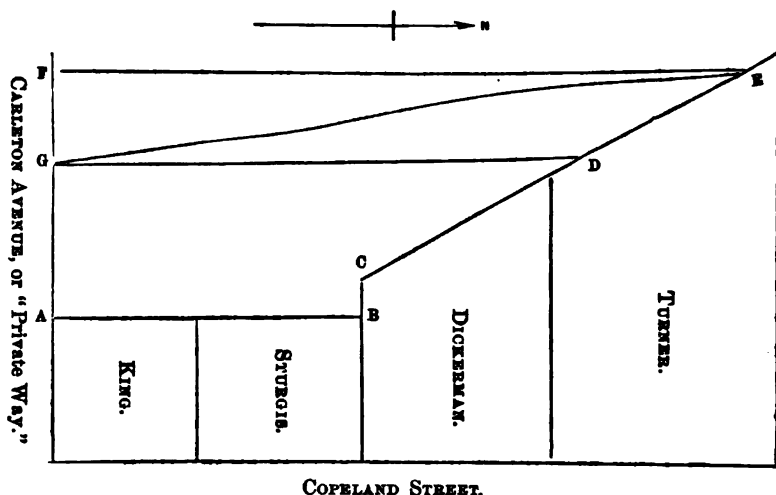
Deed — Boundary — Ambiguity.

If a deed fixes exactly the location of all the lines and boundaries of the land conveyed, its construction cannot be controlled or affected by parol evidence.

A deed described the land conveyed as beginning at a point in the line of a private way, which ran westerly from C. Street, at the southwest corner of A.'s lot, thence northerly in a line parallel with C. Street and by the land of A. a certain number of feet to an angle, thence northwesterly "in line of a stone wall" and

by land of B. a certain number of feet, "more or less, to a point," thence southerly "in a line parallel with said C. Street" a certain number of feet, more or less, to the line of the private way, and thence by the way "sixty feet" to the place of beginning. A survey showed the length of two of the lines other than that on the private way to be somewhat less than the distance stated in the deed, which was qualified in each instance by the words "more or less." *Held*, that this part of the description was controlled by the location of the lines and monuments; and that there was no legal ambiguity in the deed.

WRIT OF ENTRY, to recover a parcel of land in Brockton, being the parcel included between the lines A B C E G, as shown on the following plan.



Plea, *nul disseisin*, and a disclaimer of title as to so much of the parcel as lies east of the line D G.

Trial in the Superior Court, before *Bishop, J.*, who allowed a bill of exceptions, in substance as follows.

The demandant put in evidence a deed from the tenant to him, dated December 3, 1889, in which the premises conveyed were described as follows: "Beginning at a point in the northerly line of a private way which runs westerly from Copeland Street, near the residence of William King, and at the southwest corner of said King's house lot; thence northerly, in a line parallel with said Copeland Street, and by land of said King and land of one Sturgis, one hundred and ten feet to an angle; thence northwesterly, in line of a stone wall, and by land of

Charles Dickerman and C. J. Turner, one hundred and forty-eight (148) feet, more or less, to a point; thence southerly, in a line parallel with said Copeland Street, two hundred and forty feet, more or less, to the north line of said private way; and thence by the said way sixty (60) feet to place of beginning."

Benjamin R. Chapman, called as a witness by the defendant, testified that he made a location by establishing a base line; that he located certain points about the premises, and made the plan from the location of bounds existing thereon; that he found at A on the plan a stone bound and gas pipe close together; that he located a stone bound half-way between A and B, and then located B, C, and G and a stone bound east of the wall at the northwest corner of the Turner lot, also two stakes on the line E G, nearly opposite C; that the distance from A to B was 110 feet; that he located E by measuring on the plan 148 feet in the line of the stone wall; that the distance from E to G was approximately 241 feet, from E to F 239.5 feet, from A to G 60 feet, and from A to F 81.5 feet; that there were two stakes at B, and the distance between these stakes and the bound C, which was the end of the stone wall, was ten feet and ten feet three inches, respectively; that the line E F and the line D G were parallel with Copeland Street; that there was no bound at F, there was a pipe or stake at G, and there were two stakes as located on the plan in the line E G, one stake being nearly opposite C and 60 feet distant from it; that he discovered the line A B by the occupation of the land and the direction of the bound at the corner of the Sturgis and King lots; that the location at C was the end of the wall, and he remembered no bound mark there; that he found a drill hole in the wall at the bound D, and looked around to see what bounds there were to indicate lines, and did not find any; that he found no monument, bound, stake, or gas-pipe at the point E; that a week or two after making the plan he read over the deed; that he got the point E by drawing through G and through one of the stakes located in the line E G opposite C; that the demandant called his attention to a stake opposite C in the line E G; that some people used a stake as a permanent bound, but that he did not remember what kind of a stake this one was, and would not want to say whether it was or was not put as a permanent

bound ; that marks at A, B, and G were all the bound marks he found ; that the distance from E to the first stake in the line of E G was 88 or 89 feet from G, the distance between the two stakes was 40 to 45 feet, and from C to the second stake in the line E G was about 60 feet ; that he did not know the exact location of Copeland Street, but that the stone bound was about 99.3 feet west from the street ; and that the measurements or calculations for this plan were made on April 21, 1890, and he then saw the bounds and stakes.

There was no evidence as to when the drill-hole at the bound D was made, or for what purpose, nor when the other stakes or bounds were put down, except such evidence as was furnished by the demandant, who testified that the tenant, while standing with him in the private way called Carleton Avenue, said, "There is a piece of land I will sell you" ; that he went to work and measured out the land ; that he came to G, walked on to the lot, and then came to the bound A ; that the tenant took his tape-line and told the demandant to put the line on the centre of the stone at A, and measure to the bound G ; that they went down to the stone wall, which lies in the line C E, to the point C ; that he put the line from A to B, and made two measurements to the point B ; that there was a stone half-way between A and B, and there was a gas-pipe at B ; that they then measured across the lot from C 60 feet to a bound in the line E G ; that the demandant put a stake down at this point by the direction of the tenant, who then went to the bound G, and sighted from G over the stake which had been put down, and the demandant put down two other stakes in the line G E and in the direction of the point E by the orders of the tenant, and a corner stake at a point close to the stone fence at the point E ; that the tenant pointed out a flat stone on the stone wall at this point ; that they then measured the distance on the stone wall from the point C to the point E ; that the tenant told the demandant to take the tape-line and place it as near that point, which was the end of the stone wall, as possible ; that the two were standing at the point C at the time ; that the tenant measured off along the stone wall 50 or 60 feet, and took up a piece of wood and placed it down at this point ; that the demandant followed along and measured from this stake in the direction of the stone wall, and

the tenant put down a second stake, to which they measured; that they then went along the third time to the point E; that the demandant thought there was a pipe at C; that when they got to E it was all measured, and then they came back; that a wooden stake was put down at E; that the tenant put down the measurements that he had taken on a piece of paper or in a book; that he afterward figured them out and told him there were 60 feet on the private way, 110 feet between the King and Sturgis lots, and the westerly line, G to E, was 240 feet, and there were 148 feet on the stone wall; that he did not measure or say anything about the distance from B to C; that the demandant agreed to pay \$150, and took possession at once, and got the deed a few days after, namely, on December 3, 1889; that he saw the tenant next in the early spring following; that he met the tenant on the land, and saw that a bound was down on the westerly line; that he also saw that gas-pipes had been put down in the line G D at two points; that when he found the second pipe he turned and said, "What have you done, Edwin Keith?" and that the tenant replied, "Well, Mr. Olson, I made a mistake. I am going to take this land and give you this" (pointing to the land on the opposite side of the line D G).

The demandant further testified that he had cleared the land entirely before this time, and the pipes were not there then; that the stakes had remained in the line E G up to that time; that a short time after this they met on the sidewalk, and the tenant asked the demandant if he would be kind enough to let him have the land, as he wanted to strike a jog in from a point in the line D G 100 feet from the private way, and to the point D; that there were conversations between them afterwards, in which the tenant offered the demandant a quantity of loam, stones, wood, and money for this land, if he would let him have it; that thereafter the tenant's son came with surveyors and staked off the land, and later a fence was put up on the line D G; and that the demandant had not had possession of the land beyond that line since.

There was evidence that the tenant had some talk with the demandant about going out on some private way north from Carleton Avenue that was to run east and west; that the de-

mandant understood that the lot was to be 60 feet wide on Carleton Avenue, but that the tenant did not say that the lot was to be parallel with Copeland Street, or how wide the lot was to be, and that the demandant did not understand that it was to be 60 feet wide; that some time in the spring the tenant told the demandant that there was a mistake in the deed, and he wanted to change it; that the demandant let the tenant have the deed; and that two days after the demandant took the deed away from the tenant again. There was no evidence as to what the number of feet in the lot was to be.

The demandant also testified that, after the measurements were made, he asked the tenant if all that land was to be his, to which the tenant replied, "Yes"; that he asked if a large rock, which he located on the land on the line E G where he had put the stakes on the northerly corner a foot in on this land, was on his land; that the tenant replied, "Well, it might come half a foot"; and that the demandant answered, "Well, if there ain't more than half a foot, I sha'n't kick then."

Albert Bates testified that he was familiar with the locality; that he was at the lot three or four days after the demandant took possession, and saw three stakes in the line G E outside of the fence as it now stands; that he measured from the centre of the wall where the wooden fence now is at the bound D to a stake in the line E G, and it was somewhere about 18 feet; that at the time there was a bound mark at the point E, a wooden stake beside the wall, "as near as a surveyor would naturally put it, because he could n't get it in the stone of the wall"; and that this was in the fall, earlier than December.

The counsel for the tenant stated there would not be any dispute that the stakes were located in the line G E.

The above evidence was admitted without objection on the part of the tenant, and it was all the evidence material to the case.

The tenant requested the judge to rule as follows: "Upon the demandant's proof, the tenant is entitled to a verdict, because, upon the construction of the deed as applied to the marks upon the face of the earth, it cannot include anything more than a lot of land to which the tenant disclaims any title; and according to the terms of the deed, as applied to the monuments which

are now known upon the testimony, the deed describes the lot A B C D G, and no other lot or more land."

The judge so ruled; and directed the jury to return a verdict for the tenant. The demandant alleged exceptions.

E. O. Achorn, for the demandant.

H. Kingman, for the tenant.

KNOWLTON, J. On the undisputed facts of this case the deed from the tenant to the demandant fixes exactly the location of all the lines and boundaries of the lot conveyed, and its construction cannot be controlled or affected by parol evidence. *Cook v. Babcock*, 7 Cush. 526. *Stowell v. Buswell*, 135 Mass. 340.

The boundary A on the plan is the starting point, at the southwesterly corner of William King's house lot, and is not in dispute. The line A B is the westerly boundary line of the lots of King and Sturgis, and is not in dispute. The point G is fixed at 60 feet from the point A, on the northerly line of the private way, and the line G D is fixed as having one end at G and running parallel with Copeland Street. It strikes the wall at D, which is a point 148 feet, more or less, from the corner at B. The only way of fixing exactly the point D is by running the line G parallel with Copeland Street until it strikes the wall, and the deed does not purport otherwise to show where on the wall the terminal boundary is. The length of the line on the wall is given in feet, with the qualification "more or less." While the survey shows the length of two of the lines to be somewhat less than the distance stated in the deed, this part of the description is controlled by the location of the lines and monuments, and there is no legal ambiguity in the deed. *Morse v. Rogers*, 118 Mass. 572.

Exceptions overruled.

CHARLES W. GOSS vs. OSCAR CALKINS.

Plymouth. November 13, 14, 1894. — January 1, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Money Lent — Exceptions — Trial — Law and Fact.

No exception lies to the refusal of the judge presiding at a trial to rule, at the close of the plaintiff's evidence, that the plaintiff is not entitled to recover, if the defendant does not rest his case upon such evidence.

In an action for money lent, the plaintiff's evidence tended to show that he gave the defendant a bank check for the sum claimed to enable the latter to pay for land which he had bought; and the defendant's evidence tended to show that the plaintiff owed him the whole amount of the check for advances made by him to the plaintiff at different times. There was also evidence tending to show that in proceedings brought in another court the defendant had testified that, at a date later than that of the last alleged advance to the plaintiff, the latter did not owe him anything; that the defendant used the money obtained by him upon the check in payment for land which he had bought; and that the plaintiff expected when he gave the check to have an interest in the land. *Held*, that the case was for the jury upon all the evidence.

CONTRACT, for money lent. At the trial in the Superior Court, before *Bishop*, J., the jury returned a verdict for the plaintiff; and the judge, at the request of the parties, reported the case for the determination of this court. If the judge erred in refusing to give certain rulings requested by the defendant, the verdict was to be set aside and judgment entered for the defendant; otherwise, judgment was to be entered for the plaintiff upon the verdict. The facts sufficiently appear in the opinion.

B. C. Moulton & E. D. Loring, (*V. J. Loring* with them,) for the defendant.

H. H. Chase & F. M. Bixby, for the plaintiff.

BARKER, J. 1. The exception taken by the defendant to the refusal of the presiding justice to rule, at the close of the evidence for the plaintiff, that upon the evidence the plaintiff was not entitled to recover, need be no further considered than to say that the refusal was not a matter of exception, for the reason that the defendant did not rest his case upon that evidence. *Hurley v. O'Sullivan*, 137 Mass. 86, and cases cited.

2. At the close of all the evidence, the defendant requested three rulings: (1) that upon the uncontradicted facts, as shown

by the plaintiff, he could not recover; (2) that upon the uncontradicted facts in evidence, as shown by the plaintiff and the defendant, the plaintiff could not recover; (3) that upon all the facts in the case shown by the plaintiff and the defendant, the plaintiff could not recover. Construing these requests strictly, they must all be held bad, because the trial was to a jury, and the requests required the presiding justice to rule upon facts which it was the province of the jury to find or to decline to find. But we have presumed in favor of the defendant that it was his intention to raise the question of law whether, upon the evidence, the defendant was entitled to have a verdict in his favor ordered by the court, and have considered the evidence in order to decide that question.

The action was in contract, and when the rulings now in question were refused, and the case submitted to the jury, the plaintiff's case stood upon a single count, upon which he sought to recover from the defendant the sum of \$3,200 for money lent by the plaintiff to the defendant on May 31, 1893. The answer was a general denial, and there was no declaration in set-off. The action was in the name of the plaintiff, but had been brought by and was prosecuted for the benefit of another person to whom the plaintiff had assigned the demand.

The circumstances which the evidence tended to prove were very unusual, and were such as might well lead the jury to doubt whether the oral testimony of either the plaintiff or the defendant was worthy of credit. The jury may well have found that both had colluded to obtain by means of false testimony the payment to the plaintiff by his trustees of a large sum of money which they could allow the plaintiff to have or could withhold from him in their discretion, and it would not be an unreasonable inference from the evidence that the plaintiff was by his testimony endeavoring to prejudice the rights of the plaintiff in interest, to whom he had assigned the demand in suit.

There was in evidence a bank check for the sum of \$3,200, given by the plaintiff to the defendant on May 31, 1893, and it was admitted that the money was drawn upon the check by the defendant. The defendant testified that, substantially, the whole amount of the check was owed to him by the plaintiff, and testified to advances made by him to the plaintiff, the date

of the last one of which previous to May 31, 1893, was March 18, 1893. But there was evidence tending to show that in proceedings brought in the Probate Court to direct the plaintiff's trustees to make him an advancement, and in consequence of which the trustees did in fact advance the plaintiff the sum of \$12,000, the defendant had testified in the latter part of April or the first of May, 1893, that the plaintiff did not then owe him a dollar. There was evidence tending to show that the defendant used the money obtained upon the check in payment for land which he had bought, and also that the plaintiff expected when he gave the check to have an interest in the land. But at one stage of the trial the plaintiff testified, in answer to a question why he paid the defendant the check of \$3,200 on May 31, 1893, that it was for the reason that the defendant wanted to make up that sum for the land; that he said he ought to have \$3,200 to buy the land with, and had paid \$300 on it to hold it. He also testified that the defendant before obtaining the check told him that he had got hold of a lot of land and paid \$300 to retain it, and wanted to make up \$3,200 to get the land, and that he gave it to the defendant in a check and got a receipt from him, which the defendant afterwards took away and altered.

If the plaintiff gave to the defendant a check for \$3,200 when he owed the defendant nothing, to enable the defendant to pay for a lot of land which he had bought, the jury might, in view of all the evidence, find that the transaction was a loan from the plaintiff to the defendant; and it was within their power to disbelieve the evidence which tended to show that the plaintiff gave the check either in payment of his indebtedness to the defendant, or with the purpose of becoming a part owner of the land.

In our opinion, the case was for the jury, upon all the evidence, and, in accordance with the terms of the report, there must be judgment for the plaintiff upon the verdict.

So ordered.

COMMONWEALTH vs. EMMA CLARKE.

Suffolk. November 26, 1894. — January 1, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Indictment not Bad for Duplicity or Repugnancy — Acquittal of Part of Charge and Conviction of the Residue.

An indictment which charges an assault with a dangerous weapon, and, by way of further aggravation, that it was with an intent to "kill and murder," is not bad for duplicity or repugnancy; and the defendant may be acquitted of a part of the charge and convicted of the residue.

INDICTMENT, charging the defendant with assault with a dangerous weapon, with intent to murder. At the trial in the Superior Court, before *Fessenden*, J., the jury returned a verdict of guilty of an assault with a dangerous weapon, and not guilty of the residue of the indictment; and the defendant alleged exceptions, the nature of which appears in the opinion.

P. J. Casey, for the defendant.

F. E. Hurd, First Assistant District Attorney, for the Commonwealth.

KNOWLTON, J. The indictment charges an aggravated assault and battery, that is, an assault with a dangerous weapon, and charges, by way of further aggravation, that it was with an intent to kill and murder, thus bringing the crime within the provisions of Pub. Sts. c. 202, § 20. The defendant contends that in the use of the words "kill and murder" the indictment is double, charging two distinct offences, namely, an assault, with an intent to commit the crime of manslaughter, and an assault with an intent to commit the crime of murder. But there is no good ground for this contention. The usual form of charging murder has always been to use in conclusion the words "kill and murder." In the particulars objected to, the indictment corresponds in form with that which was approved in *Commonwealth v. Fenno*, 125 Mass. 387.

The defendant was acquitted of a part of the charge contained in the indictment, and was properly convicted of the residue, which was also substantially and properly charged in the indict-

ment. Pub. Sts. c. 214, § 18. *Commonwealth v. Drum*, 19 Pick. 479. *Commonwealth v. Squires*, 97 Mass. 59. *Commonwealth v. Dean*, 109 Mass. 349. *Commonwealth v. McGrath*, 115 Mass. 150. *Exceptions overruled.*

COMMONWEALTH vs. PATRICK MULHALL.

Suffolk. November 26, 1894. — January 1, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Municipal Ordinance — Offer of Proof.

An ordinance of the city of Boston which provides that "no person shall carry or cause to be carried on any vehicle in any street a load the weight whereof exceeds three tons, unless such load consists of an article which cannot be divided," is reasonable, constitutional, and valid, under Pub. Sts. c. 53, § 15; and an offer of proof which does not take the case out of the field of regulation by the Legislature, or by the mayor and aldermen as a local tribunal acting under the authority of the Legislature, is rightly refused.

COMPLAINT, for violating § 6 of chapter 6 of the Revised Regulations of the City of Boston of 1892, which is as follows: "No person shall carry or cause to be carried on any vehicle in any street a load the weight whereof exceeds three tons, unless such load consists of an article which cannot be divided."

At the trial in the Superior Court, before *Richardson, J.*, it was admitted by the defendant that he was the driver of a team of four horses and a four-wheeled wagon upon which was a load of granite stones of six tons' weight, and that the load did not consist of an article which could not be divided, and that the team so loaded was driven by him upon, over, and along a certain public street in Boston called Dorchester Avenue.

The defendant offered to prove, if competent and material, that at the time he was a resident of Quincy in the county of Norfolk; that the load of stones he was thus hauling was taken from a quarry operated by his employer in Quincy; that he was hauling the load from the quarry through Boston to Cambridge, where the stones had been sold, to deliver the same; that the average and fair load of a team of four horses is seven tons, and

the average and fair load of a team of two horses is four tons, both within and without the limits of the city of Boston; that the business of his said employer had been for many years extensively carried on at Quincy, and the average number of teams used in hauling stones from the quarries to and through the city of Boston daily exceeded twenty-five, part of them teams of two horses but most of them teams of four horses, and that the effect of limiting each team to a load of three tons would be to increase the cost of hauling the stones to such an extent as practically to destroy the business of his employer, because of his inability to compete by reason of the increased cost with dealers in similar stone quarried in Nova Scotia and elsewhere, and transported to Boston in vessels; and that the hauling of the average load of stones, as above stated, did not and would not materially injure or affect the streets of Boston, or unreasonably interfere with the use by others of the streets, or endanger public travel thereon.

Upon these admissions and facts the defendant requested the judge to rule as follows: "1. The mayor and aldermen had no authority to make or pass the regulation in question. 2. The regulation is unconstitutional and void. 3. The regulation is unreasonable and unreasonably restrains trade, and is therefore void. 4. The defendant cannot be convicted on the above facts of violating said regulation."

The judge refused to give any of the above rulings, and ruled that, even if the evidence offered, so far as competent, is sufficient to prove all of the facts which it might tend to prove, still they would constitute no defence to the complaint, and also ruled that the regulation was reasonable, constitutional, and valid, and, the facts alleged in the complaint having been admitted to be true, directed the jury to return a verdict of guilty, which was accordingly done; and the defendant alleged exceptions.

G. W. Wiggin & P. H. Cooney, for the defendant.

F. E. Hurd, First Assistant District Attorney, for the Commonwealth.

KNOWLTON, J. By Pub. Sts. c. 53, § 15, it is provided that "the mayor and aldermen and selectmen may make such rules and regulations for the passage of carriages, wagons, carts,

trucks, sleds, sleighs, horse cars, or other vehicles, or for the use of sleds or other vehicles for coasting in and through the streets or public ways of a city or town, as they may deem necessary for the public safety or convenience, with penalties for the violation thereof not exceeding twenty dollars for each offence." This statute was originally enacted in similar language in the St. of 1875, c. 186, § 1. The ordinance which the defendant is alleged to have violated is as follows: "No person shall carry or cause to be carried on any vehicle in any street a load the weight whereof exceeds three tons, unless such load consists of an article which cannot be divided." The statute above quoted has reference to the safety and convenience of the public in the use of the streets. Many of the streets of Boston are greatly crowded, not only with pedestrians, but with vehicles of almost every kind. It cannot fairly be said that this ordinance has no reference to the convenience or safety of the public who use the streets. We can see that very heavily loaded teams, drawn by four or six horses, in the most crowded parts of the city, might seriously interfere with the convenient use of the streets by others. If the ordinance is within the class of ordinances in regard to which this statute permits the mayor and aldermen to exercise their judgment and discretion, we cannot declare it void on the ground that we might have decided the question in reference to the necessity of the ordinance differently. If they deem such an ordinance necessary for the public safety or convenience, and if it is not a clear invasion of private rights secured by the Constitution, it must stand as a regulation made under legislative authority. We think the facts offered to be proved do not take the case out of the field of regulation by the Legislature, or by the mayor and aldermen as a local tribunal acting under the authority of the Legislature. If it appeared that the ordinance could have no relation to the safety or convenience of the public in the use of the streets, the fact that the mayor and aldermen declare the regulation to be necessary would not give it validity. But we cannot say that they were in error in deciding that the use of heavily loaded vehicles is a matter affecting the public in the use of the streets, which may be regulated under the statute, nor can we say that the ordinance is anything more than a regulation, upon the necessity of

which their decision is final. *Commonwealth v. Stodder*, 2 Cush. 562. *Commonwealth v. Robertson*, 5 Cush. 438. *Commonwealth v. Fenton*, 139 Mass. 195. *Commonwealth v. Plaisted*, 148 Mass. 375. *Commonwealth v. Ellis*, 158 Mass. 555.

Exceptions overruled.

COMMONWEALTH vs. HENRY McCONNELL.

Suffolk. November 26, 1894. — January 1, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

*Right of Defendant in Criminal Case to make unsworn Statement to Jury —
Objection to Prosecutor's Comment on such Statement — Trial.*

A person on trial for a crime not capital, who is defended by counsel, has no right to make an unsworn statement of facts to the jury.

If a person on trial for a crime not capital, who is defended by counsel, is allowed to make an unsworn statement of facts to the jury, he has no ground of exception to a comment upon the weight to be given to such statement, and not upon his failure to testify, made by the prosecuting attorney in his argument to the jury, but which is afterwards withdrawn, upon the defendant's objection.

INDICTMENT, for receiving stolen goods on January 29, 1894, at Boston. At the trial in the Superior Court, before Bond, J., the jury returned a verdict of guilty; and the defendant alleged exceptions, which appear in the opinion.

J. E. Bates, for the defendant.

M. J. Sughrue, Second Assistant District Attorney, for the Commonwealth.

BARKER, J. The defendant was tried upon an indictment charging him with the offence of receiving stolen goods, and was defended by counsel. After the close of the evidence for the prosecution, the defendant's wife and one Sullivan were sworn for the defence, and counsel then stated that the defendant did not wish to testify, but wished to make a statement to the jury before the introduction of the testimony of his witnesses, and saying that the testimony would be better understood and appreciated after the defendant's personal statement, moved that the defendant might be allowed to make his own statement at the outset, and as prefatory to the testimony to be submitted in his

behalf. This motion was denied, the court requiring the defendant to submit all testimony in his behalf before making any personal statement; and the defendant excepted. After the wife and another witness had testified for the defendant, he began to make a statement to the jury, when the district attorney interrupted, saying that he wished to call witnesses in rebuttal of the wife's testimony; and he was allowed to recall a witness, who contradicted certain material evidence given in the defendant's favor by his wife. The defendant was then allowed to make a statement to the jury, after which the case was argued to them by his counsel.

The district attorney, in his closing argument, began to explain to the jury how the statement of the defendant differed from testimony, the prosecution having had no opportunity to cross-examine the defendant. To this explanation the defendant excepted; whereupon the district attorney ceased to remark upon the subject, withdrew what he had said with reference to it, and asked the jury not to consider what he had said; and no further allusion was made thereto.

The defendant now contends that he had an absolute right to make the unsworn statement as a part of his defence, and to introduce it as prefatory to the testimony of his witnesses, and that it was error for the court to compel him to postpone and to subordinate his personal statement to the testimony of the other witnesses, and to allow an interruption of his statement by the interpolation of evidence in contradiction of his witnesses; and also that the comment of the district attorney was a serious error, which, in the absence of appropriate instructions, was not cured by the withdrawal of the remarks.

There was also an exception to the refusal to strike out such of the testimony as related to articles included among the stolen goods and not produced at the trial; but this exception was not argued, and is waived.

It is evident from this statement of the case that the trial was in several respects irregularly conducted; but we find no error prejudicial to the defendant, and his exceptions must be overruled.

He relies upon the following cases: *Rex v. O'Coigly*, 26 How.

St. Tr. 1191, 1374; *Rex v. Watson*, 32 How. St. Tr. 1, 20, 538; *Rex v. Thistlewood*, 33 How. St. Tr. 682, 894; *Regina v. Beard*, 8 C. & P. 142; *Regina v. Malings*, 8 C. & P. 242; *Regina v. Butcher*, 2 Mod. & Rob. 228; *Regina v. Manzano*, 2 F. & F. 64. But in none of these cases, nor elsewhere in the law, is there authority for the position that a defendant who has the right to testify in his own defence if he chooses, and who is defended by counsel, has an absolute right to make an unsworn assertion of facts as a part of his defence, and to introduce it as prefatory to the testimony of witnesses on his behalf. On the contrary, it is fairly to be deduced from the cases cited, and it is the settled and correct practice here, that, save in capital cases, a person upon trial for crime who is defended by counsel has no absolute right to make as a part of his defence any unsworn statement as a statement of fact. In prosecutions for high treason in England, and in capital trials here, it has been the practice to allow the prisoner, at some stage of the trial, to make to the jury such a statement as he might choose. But in trials for treason in England, the proper time for the statement was not only after the conclusion of the evidence, but after the argument of his own counsel. See *Rex v. Watson*, 32 How. St. Tr. 1, 538, where Lord Ellenborough said to the prisoner after the argument of his counsel, "Mr. Watson, I am to inform you that if you wish to address any observations to the jury, this is the time for you to do so; but you must not after the counsel for the Crown has replied." See also *Rex v. Thistlewood*, 33 How. St. Tr. 682, 894, in which, at the same stage of the trial, Lord Chief Justice Abbott said, "Arthur Thistlewood, if you wish to offer anything from yourself to the gentlemen of the jury, in addition to what has been addressed to them by your learned counsel, you are at liberty to do so, and this is the proper time."

In capital trials in this Commonwealth a somewhat similar practice has prevailed, and it is not modified or abandoned in cases where the prisoner avails himself of his right to give testimony in his own behalf. But the practice as to the time of the statement has been uniform, and the proper time is after the arguments of both counsel, and immediately before the charge to the jury. In other than capital cases, when the prisoner is defended by counsel, so far as we have personal knowledge of

the practice, and so far as we are in any way informed, it has never been the practice in this Commonwealth to allow a defendant put upon trial for crime to make, as of right, an unsworn statement of facts to the jury, and it is clear that he has no such right. A person upon trial for a crime not capital must, unless for some good reason the judge may see fit in his discretion to vary in favor of the defendant the established practice, be bound by the established course of trial. This requires the jury to try the case upon the evidence, and allows no one to give evidence, or to state to the jury facts as matter of fact, save under the sanction of an oath or an affirmation under the pains and penalties of perjury. While, if a person upon trial for crime is not defended by counsel, he must be allowed to conduct his case himself, and from the necessity of the case it may be impracticable to prevent him from making statements which he has no right to make, if he employs counsel he must, as was said in *Regina v. Beard*, "submit to the rules which have been established with respect to the conducting of cases by counsel." No doubt, if he employs counsel he may himself take part in his own defence by addressing the jury, either in opening his defence or in arguing the cause; but in either case he must keep himself within the line allowed to counsel, and in neither can he make a statement as of fact. The object of an opening, whether made by party or counsel, is to state to the jury the evidence which it is proposed to adduce and the law on which the party expects to rely; and the assertion of matters as facts upon the authority of the person who makes the final argument or summing up of the cause is not legitimate in a closing argument. There have been, no doubt, some exceptional instances in England, and perhaps here, though none here have been brought to our attention, when, under very unusual circumstances, a prisoner who had not the right to testify has been allowed, in cases not capital and when defended by counsel, to make an unsworn statement of facts to the jury. Such are some of the cases cited by the defendant. But when the regular practice has been departed from, it has usually been because of circumstances which went far to make it a necessity to allow such a statement in default of any competent evidence, and the judges who have allowed a departure from the regular course of

trials have protested that it was bad practice, and not to be drawn into a precedent in ordinary cases. See *Regina v. Walkling*, 8 C. & P. 243; *Regina v. Manzano*, 2 F. & F. 64. *Regina v. Malings*, 8 C. & P. 242, is directly contrary to *Regina v. Boucher*, 8 C. & P. 141, and to *Regina v. Beard*, 8 C. & P. 142. Since all persons upon trial in our courts for crime are now made competent witnesses in their own behalf by statute, it can never be necessary here to allow such a person to make an unsworn statement of fact because of a lack of competent evidence. If the evidence is not forthcoming, its absence is not from necessity, but from choice.

The defendant in the present case had no right to make a statement of fact to the jury except under the statute allowing him to testify as a witness in his own behalf, and he was not aggrieved by any action of the court with reference to the statement which he asked leave to make, and which he finally did make. On the other hand, it was an error to allow him to make it at all; but of this error he cannot complain.

Having been allowed to make an unsworn statement of facts to the jury, the defendant had no ground to object to the line of argument commenced by the district attorney, but which the latter withdrew upon the defendant's objection. The bill of exceptions does not show that the comment was upon the failure of the defendant to testify, but that it was upon the weight to be given to his unsworn statement. This was a legitimate matter for argument; and comment upon the absence of that test of the truth of statements which is furnished by cross-examination was pertinent. The defendant implies, by the language of his brief, that the comment was upon his failure to testify, and that instructions upon this point should have been given to the jury. If such is the proper construction of the bill of exceptions, yet it appears that no such instructions were asked. No exception was taken to any order or ruling of the presiding judge, nor was he asked to take the case from the jury. The exception taken was to an observation of the district attorney; and the only request made to the presiding justice was that he would note the defendant's objection and exception to that observation.

Exceptions overruled.

COMMONWEALTH vs. GEORGE H. PHILLIPS.

Suffolk. November 26, 1894. — January 1, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Rape — Evidence — Instruction — Interrogatory improper in Form.

At the trial of an indictment for rape upon a girl alleged to be under sixteen years of age, her testimony as to her age, even if hearsay, is competent; and an instruction that to determine her age the jury may take into consideration her appearance in connection with her testimony is correct.

At the trial of an indictment for rape upon a girl alleged to be under sixteen years of age, the mother was asked, on direct examination, "Did your little girl complain to you of what this man [the accused] had done to her?" and she answered, "Yes." She also testified that the girl told her two days after the assault, and on the following day the physician examined the girl. The defendant objected, and the objection was overruled. *Held*, that, although the question was improper in form because it introduced the name of the accused, yet, as the objection was not shown to have called the attention of the presiding justice to the point, and no request was made to withdraw the question and answer from the consideration of the jury, the defendant had no ground of exception.

INDICTMENT, in three counts, for rape on Lizzie Berkman, Sarah Marcus, and Rosa Finklestein, on April 19, 1894; said Lizzie, Sarah, and Rosa each being alleged to be under sixteen years of age.

At the trial in the Superior Court, before *Bond, J.*, the jury returned a verdict of assault with intent to rape Lizzie Berkman and Sarah Marcus, and not guilty on the count charging a rape on Rosa Finklestein. The defendant alleged exceptions, in substance as follows.

The defendant, to show a motive for the prosecution, asked the mother of one of the girls, on cross-examination, if she had not said to one Finklestein, speaking of the defendant, "You ought to be ashamed to have such a man around you, boarding at your house; you and I are Jews, and you have no right to have that Christian at your house." And she answered, "Yes, I did say so to Finklestein."

Afterward the counsel for the defendant, in putting in his case, to show bias on the part of the mother, asked Finklestein if she did not say to him, within two months, what she had already testified to. The judge, on objection, excluded the question.

The only evidence offered by the Commonwealth of the age of the children was the testimony of the children themselves, and the defendant contended that, inasmuch as their evidence on this point was purely hearsay, the same was not competent to prove age. The judge ruled that such evidence was competent, to which ruling the defendant excepted.

On cross-examination, the children testified that their knowledge of their age was hearsay. The court instructed the jury, in substance, that to determine the age of the children they might take into consideration their appearance in connection with their testimony. To this ruling the defendant duly excepted.

The attorney for the government asked the mother of the Berkman girl, on direct examination, "Did your little girl complain to you of what this man Phillips had done to her?" The mother replied, "Yes." She also testified that she told her on Sunday, and on the day after she told her the physician examined the child. The examination was on April 22, 1894. This was objected to by the defendant; the objection was overruled, and the defendant excepted.

W. H. Baker, for the defendant.

M. J. Sughrue, Second Assistant District Attorney, for the Commonwealth.

BARKER, J. 1. The exception to the refusal of the court to allow a witness for the defence to testify to a statement which had already been testified to upon cross-examination by a witness examined for the prosecution, is not argued upon the defendant's brief, and is waived.

2. The defendant's contention that the testimony of the children as to their own ages was incompetent, because hearsay, is unsound. Such testimony has been repeatedly held competent. See *Hill v. Eldridge*, 126 Mass. 284, and cases cited; also *Commonwealth v. Stevenson*, 142 Mass. 466.

3. There was no error in the instruction that to determine the age of the children the jury might take into consideration the appearance of the children in connection with their testimony. Whether their appearance tended to corroborate or to disprove their testimony is not stated, and in either case the appearance of a witness is a proper element for the consideration of a jury in weighing his testimony.

4. The question to the mother of one of the children, whether her child complained to her "of what this man Phillips had done," was improper in form, because it introduced the name of the accused, and it would no doubt have been excluded if objection had been made to the question upon that ground. But no such objection is shown to have been made. The objection is not shown to have called the attention of the presiding justice to the point now raised; nor was a request made to withdraw the question and the answer from the consideration of the jury. The answer was a simple affirmative coupled with the statement of the times when complaint was made by the child, and the exception must be overruled. *Exceptions overruled.*

COMMONWEALTH vs. CHARLES F. CRANE.

Suffolk. November 28, 1894. — January 1, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Oleomargarine in Imitation of Butter — Sale in Violation of Statute.

The St. 1891, c. 412, § 4, was not intended to draw fine distinctions between different kinds of oleomargarine, all of which would resemble butter; but it requires that every one who delivers oleomargarine, of whatever sort, from a vehicle upon the public streets, shall carry along with him upon his vehicle a public notice that he is licensed to sell oleomargarine.

COMPLAINT, under St. 1891, c. 412, § 4, to the East Boston District Court, for delivering from a certain vehicle, upon a public street in Boston, oleomargarine made in semblance of pure butter, and not having on both sides of said vehicle a placard in uncondensed Gothic letters not less than three inches in length, the words, "Licensed to sell oleomargarine." At the trial in the Superior Court, before *Richardson, J.*, the jury returned a verdict of guilty, and the defendant alleged exceptions, the nature of which sufficiently appears in the opinion.

H. M. Ayars, for the defendant.

F. E. Hurd, First Assistant District Attorney, for the Commonwealth.

ALLEN, J. By St. 1891, c. 412, § 4, "Whoever peddles, sells, or delivers from any cart, wagon, or other vehicle, upon the public streets or ways, oleomargarine, butterine, or any substance made in imitation or semblance of pure butter, not having on both sides of said cart, wagon, or other vehicle the placard in uncondensed Gothic letters not less than three inches in length, 'Licensed to sell oleomargarine,' shall be punished," etc. The defendant introduced evidence tending to show that there are two kinds of oleomargarine, one of which (being the kind which he admitted that he delivered from his wagon) is the article usually known by that name, looking like pure butter, and not easily distinguished therefrom except by experts; and the other is oleomargarine dishonestly and designedly made in imitation of the best pure butter, for the purpose of being palmed off on the public as butter. Upon this evidence, the defendant contended that the section of the statute above cited is applicable only to the second kind of oleomargarine. But this is too narrow a construction of the statute. Whoever delivers oleomargarine from a vehicle upon the public streets must have upon his vehicle the placard described. This statute was not intended to draw fine distinctions between different kinds of oleomargarine, all of which would resemble butter; but it requires that every one who thus delivers oleomargarine, of whatever sort, shall carry along with him upon his vehicle a public notice that he is licensed to sell oleomargarine; in other words, that he shall go under his true colors. See *Commonwealth v. Huntley*, 156 Mass. 236, 239.

Exceptions overruled.

COMMONWEALTH vs. JOSEPH E. SMITH.

Suffolk. November 26, 1894. — January 1, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

*Election — Discretion of Presiding Justice — Allegations in Indictment —
Instructions — Witness — Letter as Evidence.*

A motion to require the government, at the close of its testimony, to elect upon which of several counts in an indictment it will rely, is addressed to the discretion of the presiding judge; and his refusal to order an election is not subject to exception.

At the trial of an indictment for embezzlement no exception lies to the refusal of the court, at the close of the testimony for the government, to quash the first count of the indictment, because it then appeared that it was made up of several distinct items, some of which were included in the other three counts, the district attorney at that time having disclaimed any reliance upon the three acts of embezzlement charged in the other counts to support the charge contained in the first count, and having elected the specific acts of embezzlement alleged upon which he relied to sustain each count; and the rights of the defendant are fully protected if the jury are instructed as to the effect of such election, the limitations of the government's case as finally submitted, and the application of the evidence thereto.

If a question is put to a witness on cross-examination which is collateral or immaterial to the issue, his answer cannot be contradicted.

At the trial of an indictment for embezzlement, a letter written by the defendant, after he had been arrested and before the indictment had been found by the grand jury, containing threats against the person to whom it was addressed, who was the general manager of the company from which the money was supposed to have been embezzled by the defendant, and who had made the complaint by which the preliminary proceedings were had whereby the defendant's alleged offences were brought to the attention of the grand jury, is competent evidence, its weight being for the jury; and its admission after the defendant has testified is within the discretion of the court, and affords the defendant no ground of exception.

INDICTMENT, in four counts, for embezzlement. At the trial in the Superior Court, before *Mason*, C. J., the jury returned a verdict of guilty upon all the counts; and the defendant alleged exceptions, the nature of which sufficiently appears in the opinion.

J. E. Bates, for the defendant.

F. E. Hurd, First Assistant District Attorney, for the Commonwealth.

LATHROP, J. 1. No exception lies to the refusal of the court, at the close of the testimony for the government, to compel the

district attorney to elect upon which count or counts he would proceed. This was a matter within the discretion of the presiding judge. *Commonwealth v. Slate*, 11 Gray, 60. *Commonwealth v. Bennett*, 118 Mass. 443. *Commonwealth v. Pratt*, 137 Mass. 98. Nor does any exception lie to the refusal of the court, at this stage of the case, to quash the first count of the indictment, because it then appeared that it was made up of several distinct items, some of which were included in the other three counts. The district attorney at that time disclaimed any reliance upon the three acts of embezzlement charged in the other counts to support the charge contained in the first count. Moreover, at the conclusion of the testimony, and before the arguments, the district attorney elected the specific acts of embezzlement alleged upon which he relied to sustain each count. This he had a right to do. *Commonwealth v. Bennett*, *ubi supra*. The jury were instructed as to the effect of such election, the limitations of the government's case as finally submitted, and the application of the evidence thereto. The rights of the defendant were thus fully protected.

2. The question put to the defendant's wife, by which it was sought to contradict and discredit the witness Wilson, who had been asked the same question upon cross-examination, was rightly excluded. The evidence did not relate to any issue in the case, but to a collateral matter. *Eames v. Whittaker*, 123 Mass. 342. *Shurtleff v. Parker*, 130 Mass. 293. *Fitzgerald v. Williams*, 148 Mass. 462. *Alexander v. Kaiser*, 149 Mass. 321. *Commonwealth v. Jones*, 155 Mass. 170.

3. The letter written by the defendant to Wilson was clearly competent. It was written after the defendant had been arrested and before the indictment had been found by the grand jury. Wilson was the general manager of the company from which the money was supposed to have been embezzled by the defendant. He also had made or caused to be made the complaint by which the preliminary proceedings were had whereby the defendant's alleged offences were brought to the attention of the grand jury. He would naturally be an important witness at the trial. The letter contained threats against Wilson, and the jury might well find that its purpose was to intimidate Wilson, and to cause him to stop the prosecution, or at least not to

appear as a witness against the defendant. Evidence of this kind is in the nature of an admission by the defendant that he has not a good defence. It is admissible, though not conclusive. The weight to be given to it is to be determined by the jury. *Egan v. Bowker*, 5 Allen, 449. *Hastings v. Stetson*, 130 Mass. 76. *Simes v. Rockwell*, 156 Mass. 372. *Moriarty v. London, Chatham, & Dover Railway*, L. R. 5 Q. B. 314.

4. The admission of the letter after the defendant had testified was within the discretion of the court, and affords the defendant no ground of exception. *Commonwealth v. Blair*, 126 Mass. 40. *Commonwealth v. Brown*, 130 Mass. 279.

Exceptions overruled.

COMMONWEALTH vs. WILLIAM F. DAVIS.

Suffolk. November 26, 1894. — January 1, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Municipal Ordinance — Constitutional Law — Meaning of "Public Address."

An ordinance of the city of Boston, providing that no person shall, except by permit from the mayor, "make any public address" in or upon any of the public grounds of the city, is constitutional, and the words "public address" apply to sermons delivered on the Common.

COMPLAINT to the Municipal Court of the city of Boston, charging that the defendant, on June 10, 1894, "did make a public address" upon certain public grounds of Boston called the "Common," without a permit from the mayor of the city, and contrary to the Revised Ordinances thereof. Section 66 of chapter 43 of the "Revised Ordinances of the City of Boston, 1892," is as follows: "No person shall, in or upon any of the public grounds, make any public address, discharge any cannon or firearm, expose for sale any goods, wares, or merchandise, erect or maintain any booth, stand, tent, or apparatus for purposes of public amusement or show, except in accordance with a permit from the mayor."

At the trial in the Superior Court, before *Fessenden, J.*, the jury returned a verdict of guilty, and the defendant alleged

exceptions, the nature of which sufficiently appears in the opinion.

J. F. Pickering, (*J. W. Pickering* with him,) for the defendant.

M. J. Sughrue, Second Assistant District Attorney, for the Commonwealth.

HOLMES, J. The only question raised by these exceptions which was not decided in the former case of *Commonwealth v. Davis*, 140 Mass. 485, is one concerning the construction of the present ordinance. That such an ordinance is constitutional is implied by the former decision, and does not appear to us open to doubt. To say that it is unconstitutional means that, even if the Legislature has purported to authorize it, the attempt was vain. The argument to that effect involves the same kind of fallacy that was dealt with in *McAuliffe v. New Bedford*, 155 Mass. 216. It assumes that the ordinance is directed against free speech generally, (as in *Des Plaines v. Poyer*, 123 Ill. 348, the ordinance held void was directed against public picnics and open-air dances generally,) whereas in fact it is directed toward the modes in which Boston Common may be used. There is no evidence before us to show that the power of the Legislature over the Common is less than its power over any other park dedicated to the use of the public, or over public streets the legal title to which is in a city or town. *Lincoln v. Boston*, 148 Mass. 578, 580. As representative of the public, it may and does exercise control over the use which the public may make of such places, and it may, and does, delegate more or less of such control to the city or town immediately concerned. For the Legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house. When no proprietary right interferes, the Legislature may end the right of the public to enter upon the public place by putting an end to the dedication to public uses. So it may take the lesser step of limiting the public use to certain purposes. See *Dillon, Mun. Corp.* (4th ed.) §§ 393, 407, 651, 656, 666; *Brooklyn Park Commissioners v. Armstrong*, 45 N. Y. 234, 243, 244.

If the Legislature had power under the Constitution to pass a law in the form of the present ordinance, there is no doubt that

it could authorize the city of Boston to pass the ordinance, and it is settled by the former decision that it has done so. As matter of history we suppose there is no doubt that the town, and after it the city, has always regulated the use of the Common except so far as restrained by statute.* It is settled also that the prohibition in such an ordinance, which would be binding if absolute, is not made invalid by the fact that it may be removed in a particular case by a license from a city officer, or a less numerous body than the one which enacts the prohibition. *Commonwealth v. Ellis*, 158 Mass. 555, 557, and cases cited. It is argued that the ordinance really is directed especially against free preaching of the Gospel in public places, as certain Western ordinances seemingly general have been held to be directed against the Chinese. But we have no reason to believe, and do not believe, that this ordinance was passed for any other than its ostensible purpose, namely, as a proper regulation of the use of public grounds.

It follows that, as we said at the outset, the only question open is the construction of the present ordinance. We are of opinion that the words "No person shall . . . make any public address," in the Revised Ordinances of 1892, c. 43, § 66, have as broad a meaning as the words "No person shall . . . deliver a sermon, lecture, address, or discourse," in the Revised Ordinances of 1883, c. 37, § 11, under which *Commonwealth v. Davis*, 140 Mass. 485, was decided. See Rev. Ord. 1885, c. 42, § 11. Whether lecture, political discourse, or sermon, a speech on the Common addressed to all persons who choose to draw near and listen is a public address, and the omission of the superfluous words in the last revision is only a matter of style and the abridgment properly sought for in codification.

Exceptions overruled.

* In addition to St. 1854, c. 448, § 35, which appears in the opinion in *Commonwealth v. Davis*, 140 Mass. 485, the government in the present case called the attention of the court to § 39 of the same statute, which confers upon the city council the care and management of the public buildings and of all the property of the city.

COMMONWEALTH vs. GEORGE BURROUGH.

Suffolk. November 26, 1894. — January 1, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

*Right of Defendant in Criminal Case to make unsworn Statement to Jury —
Confessions — Question for Jury.*

A person on trial for a crime not capital, who is defended by counsel, has no right to make an unsworn statement of facts to the jury.

The fact, at the trial of an indictment, that the defendant had been called upon by the presiding justice of the Municipal Court of Boston while a complaint was pending against him in that court upon the charges contained in the indictment, and during proceedings in that court against other defendants who were charged in another complaint with the offence described in the second count of the indictment, to tell the justice of the Municipal Court about the defendant's connection with the cases, and that thereupon the defendant testified in the case against the other persons so charged, does not entitle him to be discharged from the prosecution.

Where the evidence is conflicting, the question whether alleged confessions were or were not voluntary is rightly left to the jury.

INDICTMENT, for two distinct offences of breaking and entering a building with intent to commit larceny, and committing larceny therein. At the trial in the Superior Court, before *Bishop, J.*, the accused was defended by counsel; the jury returned a verdict of guilty on both counts; and the defendant alleged exceptions.

J. E. Bates, for the defendant.

M. J. Sughrue, First Assistant District Attorney, for the Commonwealth.

BARKER, J. 1. The defendant had no right, without being sworn as a witness, to make a narrative statement to the jury, or to tell them his side of the story. *Commonwealth v. McConnell*, ante, 499. The refusal of the court to permit him to make any statement to the jury except by way of argument, unless he was first sworn as a witness in his own behalf, was correct, as was the final exclusion of his proposed statement when he declined either to be sworn or to argue the case.

2. The fact that the defendant had been called upon by the presiding justice of the Municipal Court of Boston, while a complaint

was pending against him in that court upon the charges contained in the present indictment, and during proceedings in that court against other defendants who were charged in another complaint with the offence described in the second count of the indictment, to tell the justice of the Municipal Court about the defendant's connection with the cases, and that thereupon the defendant testified in the case against the other persons so charged, did not entitle him to be discharged from the prosecution. The Commonwealth was not represented in the proceedings before the Municipal Court by its prosecuting officers; and it is unnecessary to consider the effect of the use by such an officer of the testimony of one also charged with the offence.

3. Before the hearing in the Municipal Court the defendant had made certain confessions to the police officer by whom he was arrested, and the officer testified that before they were made he said to the defendant that he had better tell all he knew about the supposed offences. But there was also evidence from another police officer, who was present during the whole interview, tending to show that no such statement was made to the defendant, and that no threat or inducement was held out to him before he made the alleged confessions. There was no evidence that any inducement or threat was used by the justice of the Municipal Court to induce the defendant to give his testimony, which was given on the day following the alleged confession to the arresting officer. The case is thus the ordinary one of conflicting evidence upon the question whether alleged confessions were or were not voluntary, and as it was left to the jury under proper instructions,* the defendant has no ground of exception. *Commonwealth v. Preece*, 140 Mass. 276.

Exceptions overruled.

* The judge called the attention of the jury to the fact that McGarr, one of the officers, had testified in one way, and Whitman, the other officer, in another way, as to what was said, and instructed the jury that, if they found the fact to be as stated by Whitman, that he had said to the defendant before the confessions were made that he had better tell all he knew about it, they should not consider the testimony of either McGarr or Whitman.

COMMONWEALTH vs. FRANK CROSSLEY.

Middlesex. December 6, 1894. — January 1, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Intoxicating Liquors — Complaint — Insufficient Allegations.

Under the Pub. Sts. c. 100, § 1, which enacts that "no person shall sell, or expose or keep for sale, spirituous or intoxicating liquor, except as authorized in this chapter," the second and third counts in a complaint which merely allege that the defendant "did unlawfully sell intoxicating liquors to a man whose name is to your complainant unknown" are insufficient; and the words that follow the third count, that "the complainant further says that all of said sales were made by [the defendant] without any lawful right or authority," are intended to apply to all the counts, and not to the third count alone.

COMPLAINT to the District Court of Central Middlesex, charging the defendant, in three counts, with selling liquor to a man whose name was to the complainant unknown. At the trial, and before judgment, the defendant moved to quash the complaint for the reason that neither the second nor third counts thereof fully, plainly, substantially, and formally set forth any offence, inasmuch as in neither the second nor third count was the authority of the defendant to make the sale complained of sufficiently negatived. Each of these counts alleged that on a certain day the defendant "did unlawfully sell intoxicating liquors to a man whose name is to your complainant unknown," and the complaint concluded with the words, "and the complainant further says that all of said sales were made by said Crossley without any lawful right or authority." The motion was overruled, and the defendant was found not guilty on the first count, and guilty on the second and third counts; and he appealed to the Superior Court. The motion to quash was there renewed before the jury was impanelled, and was overruled by *Lilley, J.*; and the defendant excepted.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

F. P. Curran, for the defendant.

G. A. Sanderson, Assistant District Attorney, for the Commonwealth.

LATHROP, J. It was expressly decided in *Commonwealth v. Byrnes*, 126 Mass. 248, that a complaint under the St. of 1875, c. 99, § 1, must negative the exception in the enacting clause, "except as authorized in this act," by the words "not having then and there any license, appointment, or authority according to law," or by other equivalent words, and that the averment that the act charged was unlawfully done was not enough.

The language of the St. of 1875, c. 99, § 1, is substantially the same as that of the Pub. Sts. c. 100, § 1, under which the complaint in the case at bar is brought; and the second and third counts are insufficient, unless the language which follows can be held to apply to one or both of these counts.

It is a general rule in criminal law, that each count of a complaint or an indictment must be sufficient in itself, and averments in one count cannot aid defects in another. To this rule there is an exception, which permits, for the purpose of avoiding repetition, a reference for some purposes from one count to another. An example of this is found in the complaint before us, where the complainant, in the second and third counts, is described as "the said complainant." The authorities on these points are fully stated in 1 Bish. Crim. Proc. (3d ed.) §§ 429-431.

The words that follow the third count are manifestly intended to apply to all the counts, and not to the third count alone, and cannot fairly be considered to be a part of that count unless they can be considered to be a part of the other counts. This method of pleading is slovenly, and is not to be encouraged. There is no precedent for it, so far as we are aware, in any adjudicated case or in any approved book of forms; and it violates the rule that each count must be complete in itself. The motion to quash the second and third counts should therefore have been granted.

Exceptions sustained.

COMMONWEALTH vs. RODNEY EDMANDS.

Middlesex. December 6, 1894. — January 1, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Cruelty to Animals — Sufficient Averment in an Indictment — Rejection of Allegation as Surplusage.

An averment in an indictment, after the statement of the formal parts and a period of time, that the defendant E. "was the person having the charge and custody of a certain animal, to wit, a horse, and it was then and during the whole time aforesaid the duty of the said E. to provide the said horse with proper shelter and protection from the weather; and that the said E. did then and during the whole time aforesaid there unnecessarily and cruelly fail to provide the said horse with proper shelter and protection from the weather," etc., clearly and sufficiently describes the offence in the language of Pub. Sts. c. 207, § 52; and as the insertion of the words "and cruelly" adds an immaterial allegation, which is not a part of the description of anything necessary to be mentioned in the complaint, the allegation may be rejected as surplusage.

KNOWLTON, J. The complaint, after the formal parts and a statement of a period of time, alleges that the defendant "was the person having the charge and custody of a certain animal, to wit, a horse, and it was then and during the whole time aforesaid the duty of the said Rodney Edmands to provide the said horse with proper shelter and protection from the weather; and that the said Rodney Edmands did then and during the whole time aforesaid there unnecessarily and cruelly fail to provide the said horse with proper shelter and protection from the weather," etc. The only exception is to the order overruling the motion to quash this count of the complaint.

1. The defendant is charged with an offence under the last part of the Pub. Sts. c. 207, § 52, and the offence is clearly and sufficiently described in the language of the statute. *Commonwealth v. McClellan*, 101 Mass. 84. *Commonwealth v. Curry*, 150 Mass. 509.

2. The insertion of the words "and cruelly" added an immaterial allegation which is not a part of the description of anything necessary to be mentioned in the complaint. This allegation need not be proved, and does not affect the validity of the

complaint, but may be rejected as surplusage. *Commonwealth v. Whitman*, 118 Mass. 458. *Exceptions overruled.*

E. A. Upton, for the defendant.

G. A. Sanderson, Assistant District Attorney, for the Commonwealth.

COMMONWEALTH vs. ADOLPHUS LOEWE & another.

Middlesex. December 6, 1894. — January 1, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Evidence — Question for Jury — Reputation of Place for the Sale of Intoxicating Liquors.

At the trial of a complaint for bringing intoxicating liquors from the town of A. into the town of B. to be there sold in violation of law, the government introduced evidence tending to prove that the defendant was bringing the intoxicating liquors into B. to a place belonging to a certain person, and that the place was used for the unlawful sale of such liquors. The defendant put in evidence tending to explain the testimony of the government witnesses, and to contradict the inferences to be drawn from it. *Held*, that it was for the jury to say whether they believed the explanation, and that they were not bound to believe it because it was not contradicted directly, or impeached. *Held, also*, that evidence of the reputation of the place at the time as a place where liquors were sold was admissible as tending to show that the defendant had reasonable cause to believe that the liquors were intended to be sold there contrary to law, the town being one in which licenses were not granted.

COMPLAINT, for bringing intoxicating liquors from the town of Acton into the town of Maynard, on July 7, 1893, the defendants having reasonable cause to believe that the same were intended for sale in Maynard in violation of law.

At the trial in the Superior Court, before *Lilley, J.*, the jury returned a verdict of guilty against both defendants; and they alleged exceptions.

T. Hillis, for the defendants.

G. A. Sanderson, Assistant District Attorney, for the Commonwealth.

HOLMES, J. The government introduced evidence which, taken by itself, tended to prove that the defendants were bringing the intoxicating liquors into the town of Maynard to a place

belonging to one Julius Loewe, and that the place was used for the unlawful sale of such liquors. As we understand the exceptions, licenses of the first five classes named in Pub. Sts. c. 100, § 10, were not granted in Maynard at the time. The defendants put in evidence tending to explain the testimony of the government witnesses, and to contradict the inferences to be drawn from it, to the effect that the liquors were intended to be transported to a person having a license in another town, but it was for the jury to say whether they believed the explanation. The argument for the defendants assumes that the jury were bound to believe their testimony, because it was not contradicted directly, or impeached. Such is not the law. If in fact the liquors were intended to be sold in violation of law, evidence of the reputation of the place at the time was admissible as tending to show that the defendants had reasonable cause to believe that the liquors were intended to be sold there contrary to law. It was let in only for that purpose.* *Commonwealth v. Harper*, 145 Mass. 100. *Sweetser v. Bates*, 117 Mass. 466. *Killam v. Peirce*, 153 Mass. 502, 506.

Exceptions overruled.

* A police officer of the town of Maynard, called as a witness by the government, was asked in direct examination with reference to Julius Loewe and his premises: "Do you know whether or not Julius Loewe was on or about July, 1893, generally known and represented to be a dealer in intoxicating liquor at that place?" The witness answered, "Yes, he had the reputation of being a dealer in intoxicating liquor on those premises." Another police officer of the town, called as a witness by the Commonwealth, was asked in direct examination, "Do you know whether or not the place had the reputation at or about that time [July 7, 1893] of being a place where intoxicating liquor was sold?" The witness answered, "Yes, it had the reputation of being a place where liquor was sold." To both questions and answers the defendants objected. The objection was overruled, and the defendants excepted.

The judge instructed the jury that the above testimony was competent, and only to be considered by them as bearing on the question whether the defendants had reasonable cause to believe that the intoxicating liquor alleged to have been brought by them into the town of Maynard at the time in question was intended for sale in said town in violation of law, and that it was to be confined to that issue alone.

COMMONWEALTH vs. CHARLES H. RUSSELL.

Suffolk. December 6, 1894. — January 1, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Statute — Oleomargarine colored to look like Butter.

The St. 1891, c. 58, § 1, entitled "An Act to prevent deception in the manufacture and sale of imitation butter," forbids the exposing for sale of oleomargarine colored to look like butter, and it is immaterial whether the particular purchaser was advised of its real character or not.

COMPLAINT to the Municipal Court of Boston, alleging that the defendant did "expose for sale a certain quantity, to wit, one pound, of a certain product commonly called oleomargarine, made partly out of an oleaginous substance not produced from unadulterated milk or cream from the same, and that said product, so exposed as aforesaid, by reason of containing annatto coloring matter, was then and there in imitation of yellow butter produced from pure unadulterated milk or cream of the same."

The case was submitted to the Superior Court upon agreed facts, which recited that the "substance was exposed for sale in such manner as to advise the consumer of its real character, but it was not free from coloration or ingredient causing it to look like butter." The counsel for the defendant contended that, inasmuch as the defendant exposed for sale oleomargarine in a separate and distinct form, and in such manner as advised the consumer of its real character, he had not violated the provisions of St. 1891, c. 58, § 1, and that he was not bound to have the oleomargarine "free from coloration or ingredient that caused it to look like butter"; that he was only bound to do one of two things, either to expose the substance in a separate and distinct form, and in such manner as to advise the consumer of its real character, or to have the substance free from coloration or ingredient that caused it to look like butter. *Hopkins, J.*, directed the jury to return a verdict of guilty, and reported the case for the determination of this court. If the direction was correct, the verdict was to stand; otherwise, a new trial was to be ordered.

S. L. Powers & R. A. Sears, for the defendant.

M. J. Sughrue, Second Assistant District Attorney, for the Commonwealth.

HOLMES, J. The statute prohibits the manufacture or exposing for sale of any compound made out of any fat not produced from unadulterated milk or cream from the same, which shall be in imitation of yellow butter produced from pure unadulterated milk, etc. Then it goes on with a proviso that it does not prohibit the manufacture or sale of oleomargarine "in a separate and distinct form, and in such manner as will advise the consumer of its real character, free from coloration or ingredient that causes it to look like butter." St. 1891, c. 58, § 1. Argument cannot make plainer that the proviso only saves such oleomargarine as is free from coloration or ingredient that causes it to look like butter. The statute did not intend to allow oleomargarine to be made or sold when so colored, whether the particular purchaser was advised of its real character or not. It easily could be sold again to persons who were not advised of it. See *Commonwealth v. Huntley*, 156 Mass. 236, 239, 240. We understand that the construction of the statute is the only question intended to be presented.

Verdict to stand.

COMMONWEALTH vs. AUGUST HEDEN.

Suffolk. December 6, 1894. — January 1, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Sending Word to Jury through Officer in Charge — Separation of Jury after Reassembling.

On the trial of an indictment for manslaughter, there is no error in sending word to the jury through the officer in charge of them, that, upon agreeing upon a verdict, they might put it in writing and separate, nor in permitting the jury after reassembling at the hour to which the court was adjourned to separate a second time, in order to allow the foreman to go home for the verdict, which he had accidentally left there.

INDICTMENT for manslaughter. Trial in the Superior Court, before *Sheldon, J.*, who, after a verdict of guilty, reported the

case for the determination of this court, in substance as follows.

The case was given to the jury Friday afternoon, June 15 ; and the jury had not agreed at the time of adjournment for the day. They were directed, if they then agreed, to reduce the verdict to writing, sign it by their foreman, seal it up, and return it into court on the next Tuesday morning, to which time the court was adjourned. This direction was given through the officer in charge of them, without the knowledge of the defendant. Tuesday morning the jury, which had in the mean time, under the direction of the court, separated and left the court-house, re-assembled in their seats. The defendant objected to any verdict being received, which objection was overruled. The clerk asked the jury if they had agreed upon a verdict. The foreman answered "Yes," and handed to the clerk a sealed envelope, which when opened was found to contain private papers belonging to the foreman, but no verdict. The foreman then stated, in presence of the whole jury, that the verdict had been agreed upon, written out, and signed by him and sealed up in an envelope before the separation of the jury ; that he had then carried this envelope home, and put it still sealed up into his safe in his house for safe keeping, because he did not wish to carry it about for three days ; that he had by mistake brought another similar envelope from his safe to court that morning, and that the sealed envelope containing the verdict was still in his safe. The judge then excused the jury for half an hour, and directed the foreman to go and get the verdict and bring it into court, which he did. The jury reassembled at the appointed time, and the foreman produced a sealed envelope, which, in answer to questions put to him by the judge in presence of the whole jury, he stated contained the verdict ; that this verdict was agreed to by all the jury, and was reduced to writing, and signed and sealed up by him before the separation of the jury ; that it had been in his personal custody or in his safe ever since, unopened and unchanged. The clerk then asked the jury if they had agreed upon a verdict ; the foreman answered that they had, and the clerk thereupon opened the last mentioned sealed envelope, which contained a written verdict of guilty, in the usual form. The clerk then asked whether the defendant was guilty or not guilty ;

the foreman answered, "Guilty"; and the clerk proclaimed the verdict in the usual manner. All these proceedings were in the presence and against the objection of the defendant. At the request of the defendant, the jury was then polled, and each juror separately affirmed the verdict. Both envelopes were of the same size and color, without any marks or writing upon them, and both were in the safe. The judge ordered the verdict of guilty to be received and recorded; and, at the request of the defendant, reported the question of law involved for the determination of this court. If the judge was not warranted in ordering the verdict to be received and recorded, or if the defendant's objection to receiving any verdict should have been sustained, then the verdict was to be set aside; otherwise to stand.

T. Riley, for the defendant.

M. J. Sughrue, First Assistant District Attorney, for the Commonwealth.

ALLEN, J. The defendant's first objection is, not that the jury were allowed to separate after agreeing upon their verdict, etc., but that the permission to do so was communicated to them through the officer in charge of them, instead of their being so told by the presiding justice in open court. It is well settled that instructions to the jury upon the substance of the case must be given only in open court. *Kullberg v. O'Donnell*, 158 Mass. 405. *Read v. Cambridge*, 124 Mass. 567. It is also well settled that in criminal cases, not capital, as well as in civil cases, the jury may be allowed to seal up their verdict and separate, when they agree during an adjournment of the court, and may come in and affirm the verdict at the next opening of the court. *Commonwealth v. Costello*, 128 Mass. 88. By common practice, this permission has been given to juries after adjournment through the officer in charge, as was done in *Chapman v. Coffin*, 14 Gray, 454, and *Commonwealth v. Carrington*, 116 Mass. 37. In the latter case the point was taken that the court could not give such permission through the officer. We see no objection to this practice.

The next objection is that there was error in permitting the second separation of the jury, and that the verdict could not properly be received thereafter. But there was no error in the course pursued by the presiding justice. Since by accident the

foreman had left the verdict at home, it was desirable, if not necessary, to get it. This might be important to preserve even the defendant's rights. The mere separation of the jury is not fatal to the rendering of a verdict. In the present case, obviously, the defendant was not prejudiced. *Commonwealth v. McCauley*, 156 Mass. 49. *Chemical Electric Light & Power Co. v. Howard*, 150 Mass. 495. *Commonwealth v. Gagley*, 147 Mass. 576. *Commonwealth v. Desmond*, 141 Mass. 200. *Nichols v. Nichols*, 136 Mass. 256. *Verdict to stand.*

CATHERINE BUTLER vs. JOHN E. BUTLER & trustee.

Suffolk. December 10, 1894. — January 1, 1895.

Present: ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

*Trustee Process — Discretion of Court — Rights of Claimant — Appeal —
Trustee's Answer.*

It is within the discretion of the court, to the exercise of which no exception lies, to decline to allow the defendant, in an action upon a judgment begun by trustee process, to withdraw a general appearance, and to overrule a motion for leave to defend the action as of the original suit.

In a trustee process, a claimant of the funds in the hands of the trustee cannot be allowed to prove that nothing was due from the trustee to the principal defendant.

If a claimant of the funds in the hands of the trustee, in a trustee process, alleges certain facts, but it does not appear that any evidence was introduced or offered in support of his claim, or that any ruling of law was asked or given in respect thereto, no question of law is presented to this court by his appeal from an order disallowing his claim.

An objection to an order charging the trustee in a trustee process, on the ground that his supplemental answer was not upon oath, cannot be raised for the first time in this court upon an appeal from the order.

If the answer of the trustee in a trustee process shows that a sum of money, which the trustee retained as a protection or security against a certain life estate, became absolutely due to the principal defendant by the extinction of that estate prior to the service upon the trustee, the latter is properly charged upon his answer.

CONTRACT, upon a judgment of the Superior Court, begun by trustee process. Writ dated January 29, 1894. The Franklin Savings Bank, summoned as trustee, answered that, at the time of service upon it, there was in its hands the sum of \$133.33,

which was subject to the order of the defendant "upon the fulfilment of certain conditions"; and this answer was sworn to. The trustee afterwards, by leave of court, filed an additional answer, alleging that the trustee lent the defendant a certain sum of money upon a promissory note secured by a mortgage of real estate in Boston, of which the plaintiff was life tenant, the defendant being the remainderman in fee, and out of that sum retained the sum of \$133.33 as a deposit to protect the trustee against the plaintiff's life estate, and upon the condition that the trustee should surrender the same to the defendant as soon as the life estate should cease as an estate superior to the trustee's claim; that subsequently the real estate was conveyed to a third person, the plaintiff releasing her interest therein, on January 15, 1894, and the mortgage was afterwards discharged by the trustee, and the note surrendered as paid, the trustee having no further claim by reason thereof; and that, at the time of service upon it, the trustee had in its hands said sum of \$133.33 as the property of the defendant, with no claim of the trustee thereon, except as the facts above stated would entitle it to any claim. This answer was not sworn to. Robert S. Hall appeared as claimant of the funds in the hands of the trustee, alleging certain facts not necessary to be stated.

At the trial in the Superior Court, before *Mason*, C. J., the defendant alleged exceptions to certain rulings, the nature of which appears in the opinion. The trustee was charged on its answer, and the claimant's claim was disallowed; and both the defendant and the claimant appealed to this court.

R. S. Hall, for the defendant and as claimant, *pro se*.

E. Greenhood, for the plaintiff.

ALLEN, J. 1. We find no question of law in the bill of exceptions presented by the defendant. The defendant contends, in a general way, that so far as appears by the record the Superior Court was not entirely just towards him. We see no reason to think so. The defendant filed a general appearance, and a motion for leave to defend the action on the judgment as of the original suit. He afterwards sought to withdraw his general appearance, but this the court declined to allow. The court also overruled the motion. These were both matters within the discretion of the court. The latter is expressly made so by statute. Pub. Sts. c. 167, § 81.

2. The trustee was charged on its answer, and the claimant's claim was disallowed. Both the defendant and the claimant appealed. We will deal first with the appeal of the latter. A claimant cannot be allowed to prove that nothing was due from the trustee to the principal defendant. *Clark v. Gardner*, 123 Mass. 358. *Moors v. Goddard*, 147 Mass. 287, 290. He appears for the purpose of showing that he is entitled to the goods, effects, or credits which may be in the hands of the supposed trustee; and he may allege and prove any facts not stated nor denied by the supposed trustee. Pub. Sts. c. 183, §§ 35, 36. In this case the claimant has alleged certain facts, but proved none. It does not appear that any evidence whatever was introduced or offered in support of his claim, or that any ruling of law was asked for or given in respect thereto. No question of law is presented by the claimant's appeal.

3. We come now to the defendant's appeal. It has been said that the principal defendant has no right of appeal from an order charging a trustee. *Kellogg v. Waite*, 99 Mass. 501. *Wasson v. Bowman*, 117 Mass. 91, 96. The defendant, however, contends that he has an interest to appeal, because a judgment against the trustee will discharge him from the defendant's claim against him. *Webster v. Lowell*, 2 Allen, 123. However this may be, no error is shown in the order charging the trustee. The chief ground of complaint is that the trustee's supplemental answer was not upon oath. An objection of this kind must be taken at the hearing, or it will be deemed to have been waived. The omission was probably by inadvertence, and might have been remedied at once if attention had been called to it. The defendant might have alleged and proved other facts not stated nor denied by the trustee, if he had seen fit to do so. Pub. Sts. c. 183, § 17. But he did not. He submitted the matter to the determination of the court upon the trustee's answers, without further proof or allegation, and, so far as appears, without calling attention to the want of an oath to the supplemental answer. The trustee was properly charged. According to the terms of its two answers, the defendant's money which the trustee retained as a protection or security against the plaintiff's life estate became absolutely due by the extinction of that estate prior to the service upon the trustee in the present action. Even with-

out the supplemental answer, the trustee, admitting funds, and showing no right to retain them, might it would seem be held chargeable.

Defendant's exceptions overruled.

Order charging trustee affirmed.

NATHANIEL E. TAFT vs. HERBERT B. CHURCH & another.

Worcester. October 2, 1894. — January 2, 1895.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Contract — Partnership — Evidence — Original Promise — Consideration — Transfer of Stock — Pledge — Damages — Action — Judgment — Pleading.

An agreement in writing, under seal, was signed by A. in the name of a firm composed of A. and B., and by its terms the firm agreed, in consideration of C.'s advancing a certain sum of money to D. and accepting from D. his promissory note and shares of a certain corporation as collateral security therefor, if the note was not paid at maturity, to purchase of C. the shares or as many of them as should amount to the sum then due on the note, at a stated price per share. In an action by C. upon the agreement, it appeared that the partnership of A. and B. was doing a brokerage business, "dealing in bonds and investments of that character, and in the promotion of new companies." There was no evidence that a transaction like the one set out in the agreement was within the scope of the partnership business, or was a usual one with firms doing a similar business; nor was there any evidence of any assent or of subsequent ratification of the agreement on the part of B., who testified that he had no knowledge of the transaction until after the suit was brought. *Held*, that there was no evidence to warrant a finding against B.

In an action against the members of a partnership upon a contract foreign in its nature to the regular business of the firm, and executed in the firm name by one partner without the knowledge of the other, the admissions of the former, not made at the time when the contract was executed, are not admissible in evidence against the latter in respect to the scope of the partnership business.

If A. agrees that, in consideration of B.'s advancing a certain sum of money to C. and accepting from C. his promissory note and shares of a certain corporation as collateral security therefor, if the note is not paid at maturity, A. will purchase of B. the shares at a stated price, this is an original promise by A., and not a mere guaranty.

The seal to a contract imports a consideration, and in an action thereon none need be proved.

If one of two partners, without the knowledge or consent of the other, executes a contract which is outside the scope of the partnership business, he may be bound, although the other is not.

If A. agrees that, in consideration of B.'s advancing a certain sum of money to C.

and accepting from C. his promissory note and shares of a certain corporation as collateral security therefor, if the note is not paid at maturity, A. will purchase the shares of B., and, at the time when C.'s note matures, B. has in his possession a certificate for the shares of stock made out in C.'s name, and on the back of which are a printed form of transfer and a power of attorney to make a transfer of the shares, this is sufficient to transfer the certificate to B.

If, by the terms of a promissory note, for the payment of which shares of stock are pledged as collateral security, the pledgee has authority to sell the stock, on breach of the promise to pay the note, without notice to the pledgor, he may, before such breach, make a valid agreement to sell the stock when that contingency shall happen.

Under Pub. Sts. c. 192, § 12, the right of a pledgee to dispose of the pledge is not limited to a foreclosure thereof.

In an action upon an agreement, by the terms of which the defendant agreed that, in consideration of the plaintiff's advancing a certain sum of money to a third person and accepting from the latter his promissory note and shares of a certain corporation as collateral security therefor, if the note was not paid at maturity, the defendant would purchase of the plaintiff the shares, or so many of them as should amount to the sum due on the note, at a stated price per share, the fact that there is no evidence of the value of the stock is immaterial.

In an action against two persons as partners, if one only is held liable, judgment may be entered against him alone, under Pub. Sts. c. 171, § 5, and no amendment of the declaration is necessary.

CONTRACT, against Herbert B. Church and Fred D. Goode, copartners under the name of Herbert B. Church and Company, upon the following agreement:

"Boston, October 5, 1892. Nathaniel E. Taft, Esq., North Oxford, Mass. In consideration of your advancing a certain sum of money to W. F. Ellis, and accepting from said Ellis his promissory note, and accepting from said Ellis as collateral security for said note one hundred fifty-seven shares of the Burlington Electric Railway Company, we, the undersigned, hereby agree, if said above named note or any renewal thereof remains unpaid in whole or in part at the date of its maturity, to purchase from you the above named block of 157 shares, or as many of them as shall amount to the sum then due to you on the note, with interest. The price to be paid by us for said stock shall be fifteen (\$15.00) dollars per share. Herbert B. Church & Co. [Seal.] In presence of Charles I. Rawson, Edward L. Collins."

Trial in the Superior Court, without a jury, before *Hopkins, J.*, who allowed a bill of exceptions, in substance as follows.

The plaintiff offered in evidence the agreement declared on, and called as a witness Charles I. Rawson, one of the attesting

witnesses, who testified that the agreement was signed by the defendant Church, in the presence of W. F. Ellis, Edward L. Collins, and himself, on the day of its date; that the first time he saw Church was in connection with this transaction, when a promissory note was made by Ellis, some time in August, 1892; that a note, which was put in evidence, was a renewal of the first named note; and that a certificate of stock, which was also put in evidence, was given as collateral security at the time of the transaction, in August, 1892.

The note introduced in evidence was dated October 5, 1892, and was for \$2,000, payable one month after date to the plaintiff, and recited that the maker had deposited "with this obligation, as collateral security," a certificate for one hundred and fifty-seven shares of the capital stock of the Burlington Electric Railway Company, "with authority to sell the same without notice, either at public or private sale, at the option of the holder or holders hereof, on the non-performance of this promise"; and was signed by W. F. Ellis.

The certificate introduced in evidence recited that W. F. Ellis was entitled to one hundred and fifty-seven shares of the capital stock of the Burlington Electric Railway Company; and contained on its back a printed form of transfer, and a power of attorney to make a transfer of the shares of stock, both signed in blank by Ellis.

Charles M. Thayer, an attorney at law, testified that he was counsel for the plaintiff in the transaction in question; that he had in his possession a note which was surrendered to Ellis at the time the note of October 5, 1892, was given; that at the same time he had in his possession an agreement accompanying the first named note, which he also surrendered; that, in lieu of the first named note and the accompanying agreement, he received the second note and the agreement in suit; that Ellis was present when he received these papers, and signed the note and handed it to him; that the certificate of stock given with the first note was in his possession, and he kept it; that the second note was protested, and he afterwards called on Church with all these papers to see if he would take the stock as agreed; that "I asked him if the stock had any value, and he said that, as it was Western stock, it would have more value for him, that

he had put some of it on the market, that it would not have so much value to him except for that purpose, and that he did not think it would be of much value to me"; and that Church put him off, and did not take the stock.

The defendant Goode testified that he had no knowledge as to either of the transactions of August and November, 1892, until after this suit was brought; that Church had no authority from him to execute any such agreement as that in suit; that the business of the firm was a brokerage business, "dealing in bonds and investments of that character, and in the promotion of new companies"; that they were not stockbrokers, and did not handle stocks at all; that he did not know personally anything about the Burlington Electric Railway stock; and that he was not excluded from free access to the books of the firm.

The defendant Church testified that he signed the agreement in suit, not on the day of its date, but on October 24, 1892; that neither he nor the firm ever received any consideration for signing it; and that the firm dealt only in those stocks in which they were interested as incorporators and promoters, but that they dealt almost exclusively in municipal bonds.

Charles I. Rawson, recalled by the plaintiff, testified as follows: "When I first saw Church, in August, 1892, at the Union Depot, Ellis paid him twenty-five dollars. Q. Was there any conversation held at that time? A. Yes, the statement of what Ellis wanted him to do was made in my presence, and, upon the suggestion of Church, we stepped around into the telegraph office and Church signed some paper. I can't tell now what it was, — whether the note or agreement. And for that service he was paid twenty-five dollars by Ellis."

A letter written by C. M. Thayer, as attorney for the plaintiff, addressed to the defendants, notifying them that the note of October 5, 1892, had been protested for non-payment, and calling upon them to take the shares of stock in accordance with their agreement of that date, was put in evidence by the plaintiff.

The defendants requested the judge to rule as follows:

"1. Upon all the evidence, the plaintiff is not entitled to recover. 2. The defendant Church could not, by virtue of general authority as partner, bind the defendant Goode by the contract

under seal set out in the declaration. 3. In order to bind the defendant Goode by the contract declared on, the plaintiff must show his previous assent or subsequent adoption thereof. 4. If Church signed the contract declared on without the knowledge of Goode, then Goode cannot be held liable thereon. 5. It is apparent on the face of the contract declared on, that said contract was made and intended for the accommodation of Ellis, and not for the benefit of, or for any consideration moving to, the firm, and the plaintiff must be held, as matter of law, affected with notice thereof, and cannot recover against the defendant Goode without proving his authority given for the making of said contract, or his assent to and ratification thereof. 6. The plaintiff must show, in order to recover on the contract alleged in the declaration, not only that said contract was properly made, and based on a sufficient consideration, but also that the plaintiff, at the time of making said contract, was the owner of the shares therein referred to, or assignee thereof, or authorized by the owner or assignee of his agent to sell and transfer said shares. 7. The authority in the note to dispose of the collateral on certain conditions did not authorize the plaintiff to sell the stock in accordance with the terms of the agreement set forth in the declaration, and said agreement is void. 8. Inasmuch as there is no evidence that the plaintiff ever foreclosed the equity to redeem the stock, and became absolute owner thereof before this suit was brought, he fails to show that he was ever ready and willing to perform his part of the contract, and cannot recover in this action. 9. As there is no evidence as to the value of the stock referred to in the alleged agreement, said stock being still in the possession of the plaintiff, it does not appear how much, if any, the plaintiff has been damaged, and he cannot recover."

The judge declined so to rule, and found for the plaintiff; and the defendants alleged exceptions.

H. L. Baker, for the defendant Church.

W. O. Kyle, for the other defendant.

C. M. Thayer, for the plaintiff.

LATHROP, J. 1. So far as the defendant Goode is concerned, we are of opinion that there was no evidence at the trial below which warranted the presiding justice in finding against him.

While it appeared that he and Church were in partnership doing a brokerage business, "dealing in bonds and investments of that character," and in the promotion of new companies, there was no evidence that a transaction like the one in question was within the scope of the partnership business. Nor was there any evidence that such a transaction was a usual one with firms doing a business similar to that the defendants were engaged in. There was also no evidence of any assent or of subsequent ratification on the part of Goode.

The admissions of Church, not made at the time the contract was executed, (see *Smith v. Collins*, 115 Mass. 388,) were not admissible against Goode in respect to the scope of the partnership business. *Tuttle v. Cooper*, 5 Pick. 414. See also *Ostrom v. Jacobs*, 9 Met. 454.

2. As to Church, we see no reason to doubt the correctness of the finding against him. He agreed to purchase certain shares of stock on the happening of a contingency. This was an original promise, and not a mere guaranty. *Monk v. Beal*, 2 Allen, 585. *Thayer v. Wild*, 107 Mass. 449. The seal imports a consideration, and none need be proved.

Although the contract did not bind the partnership, it bound the defendant Church. The fact that he attempted to bind his partner, and did not succeed, does not avoid his own act. *Wiggin v. Lewis*, 12 Cush. 486.

At the time that the note of Ellis matured, the plaintiff had in his possession a certificate of stock of the Burlington Electric Railway Company, made out in the name of Ellis. On the back of the certificate was a printed form of transfer and a power of attorney to make a transfer, both signed in blank by Ellis. This was sufficient to transfer the certificate to the plaintiff. *Andrews v. Worcester, Nashua, & Rochester Railroad*, 159 Mass. 64. By the terms of the contract between Ellis and the plaintiff, the latter had authority to sell the stock, on breach of the promise to pay the note, without notice to Ellis. While the plaintiff could not sell the pledge until there had been a breach of his contract with Ellis, we see no reason why he could not, before such breach, make a valid agreement to sell it when this contingency should happen.

The contention of Church that a foreclosure of the pledge

was necessary, under the Pub. Sts. c. 192, §§ 10, 11, is without foundation. By § 12, the right of the pledgee to dispose of the pledge "in any other manner allowed by the contract or by the rules of law" is preserved.

These considerations dispose of all the material requests for instructions except the ninth. As to this, it may be remarked that the fact that there was no evidence of the value of the stock is immaterial. By the terms of the agreement all the shares were to be purchased, or so many of them as should amount to the sum due on the note at maturity, at fifteen dollars a share.

Although the action is against two persons as partners, and one only is held liable, judgment may be entered against him alone, under the Pub. Sts. c. 171, § 5, and no amendment of the declaration is necessary. "The legal effect of the statute is, that such discrepancy between the contract declared on, and that proved, shall be deemed no variance." *Wiggin v. Lewis*, 12 Cush. 486. See also *Leonard v. Robbins*, 13 Allen, 217; *Downing v. Coyne*, 121 Mass. 347; *Merchants' Ins. Co. v. Abbott*, 131 Mass. 397, 407.

The result is, that the exceptions of the defendant Goode are sustained, and those of the defendant Church are overruled.

So ordered.

MARY GALVIN, administratrix, vs. OLD COLONY RAILROAD
COMPANY.

Bristol. October 22, 1894. — January 2, 1895.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

Personal Injuries — Railroad — Master and Servant — Action — Negligence.

A., who was employed by a railroad corporation as a freight handler, was told to go with B., another employee, on to one of the railroad piers and get a barrel of goods. Instead of following B., he walked along a narrow passageway between a railroad track and a cotton platform, the distance between the rail and the platform being three and a half feet throughout its length, which was not designed to be used in this way, although it was sometimes so used. There was a safer, though longer, way provided, which B. took. A., without looking

to see whether a locomotive engine was coming, proceeded along the shorter way, and was struck by an engine while standing with his back to the platform and his truck held in front of him, and was injured. He was familiar with the premises, having worked there a year or more. There were several tracks on the pier, the engine was going up and down the tracks all day long, and the time of the accident was "just the busy time." *Held*, in an action against the corporation for his injuries, that A. was not in the exercise of due care; and that the action could not be maintained.

It seems, that a jury would not be warranted in finding negligence on the part of the engineer of an engine running back and forth on the tracks of a railroad pier, in not sounding the whistle or ringing the bell to warn an employee of the railroad corporation who is familiar with the premises, and who is walking along a narrow passageway not intended for use, though sometimes used, at the side of a track and between it and a platform used for freight, in the performance of his work as a freight handler; it not being customary to give such warning, the employees being accustomed to look out for themselves.

TORT, for personal injuries occasioned to the plaintiff's intestate, Michael Galvin, while in the employ of the defendant corporation as a freight handler, by being struck by the defendant's locomotive engine through the alleged negligence of the engineer. At the trial in the Superior Court, before *Braley, J.*, the jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The facts sufficiently appear in the opinion.

J. H. Benton, Jr. & C. F. Choate, Jr., for the defendant.

J. W. Cummings, (*C. R. Cummings* with him,) for the plaintiff.

LATHROP, J. Taking the most favorable view of the evidence in this case for the plaintiff, we are of opinion that she is not entitled to recover. Her intestate was injured while using a narrow passageway between a railroad track and a cotton platform, which was not designed to be used in this way, although it was sometimes so used. There was a safer way, though longer, provided. Galvin was told to go on to the pier with O'Brien and get a barrel of oysters. Instead of following O'Brien, who took the safer way, he chose the shorter way, and then, without looking to see whether the locomotive engine was coming, proceeded along this way with his truck. He was familiar with the premises, having worked there a year or more. The place of the accident was a pier, where there were several tracks, and the locomotive engine was going up and down the tracks all day long, and the time of the accident was "just the busy time." The evidence shows that the intestate, being warned by the shout of a fellow workman, turned round, and, seeing the

engine close upon him, backed up to the platform, holding his truck in front of him, and was struck by the engine.

There is no evidence in the case to show that it was customary for the engineer to ring the bell or blow the whistle as a warning to the employees on the pier, and they therefore had no right to rely upon a warning being given. So far as the evidence goes, it shows that the men were accustomed to look out for themselves. The way used by Galvin was of the same width throughout its length. There was, therefore, no trap, and the case is thus distinguishable from *Ferren v. Old Colony Railroad*, 143 Mass. 197.

If it be said that there was need of haste, and that therefore Galvin was justified in using the shorter way, the answer is that there is no evidence that there was not time enough to go by the longer and safer way, and, moreover, he was directed to go with O'Brien, who went by the latter way.

It would seem also that there is no evidence which would warrant the jury in finding negligence on the part of the engineer. His act in not sounding the whistle or ringing the bell is the only negligence charged. It is to be remembered, however, that Galvin was not walking upon the track, but at the side of it. While the distance between the rail and the platform is stated to be three and a half feet, there is no evidence as to how much the locomotive engine projected beyond the rail. For aught that appears, there was no reason for the engineer to suppose that there was not room enough to pass in safety. It certainly could not have been anticipated by the engineer that Galvin, when he stood with his back to the platform, would place his truck in front of him and thus lessen the distance.

It is not necessary to decide this point, however, as we are of opinion that, upon the evidence, the plaintiff either took the risk or was not in the exercise of due care, and that the first and second requests for rulings should have been given.* *Shea v. Boston & Maine Railroad*, 154 Mass. 81. *Lynch v. Boston & Albany Railroad*, 159 Mass. 536. *Aerkfetz v. Humphreys*, 145 U. S. 418, 419.

Exceptions sustained.

* These requests were as follows: "1. Upon all the evidence the plaintiff cannot recover. 2. There is no evidence that Galvin was in the exercise of due care."

TIMOTHY SULLIVAN vs. LOWELL AND DRACUT STREET
RAILWAY COMPANY.

Middlesex. November 14, 1894. — January 2, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Loss of the Services and Society of the Plaintiff's Wife — Evidence.

In an action by a husband for the loss of his wife's services and society, occasioned by an injury alleged to have been received by her through the defendant's negligence, if evidence of disturbed marital relations at particular times is admitted, but confined by direction of the judge to the question of damages, and the jury find for the defendant, the plaintiff has no ground of exception.

TORT, for the loss of the services and society of the plaintiff's wife, and for expense incurred by him in providing surgical attendance for her, occasioned by an injury alleged to have been received by her on April 30, 1891, while a passenger on one of the defendant's cars, through the negligence of the defendant and its servants. Trial in the Superior Court, before *Bishop, J.*, who allowed a bill of exceptions, in substance as follows.

The plaintiff introduced evidence tending to show that his wife received severe injuries by the negligence of the defendant, its agents or servants, as set out in his declaration; and that he had expended money for medicines and for the services of physicians who attended his wife on account thereof.

The defendant introduced evidence tending to show that there was no negligence upon its part, or on the part of its agents or servants, as the plaintiff contended.

The alleged injuries sustained by the wife consisted of a rupture, some six or seven inches in length, extending along the central line of the abdomen, and a fracture of the collar bone.

The defendant contended that the injuries were occasioned by the acts of the plaintiff, and were not due to anything happening while the wife was a passenger on its car; that the rupture was an old one, of some months' standing prior to April 30, 1891; and, in support of this contention, the defendant, without objection, introduced in evidence the testimony of a neighbor of the

plaintiff, one Mrs. Helliwell, who testified that, upon a certain day in January, 1890, she was called into the plaintiff's house, where the plaintiff's wife was on her back on the floor, and the plaintiff had hold of her feet and was kicking her with his boots on, and kicked her twice after the witness went in, while the wife put her hands to her back and leaned over to the right side, and the plaintiff called her crazy; and that these kicks were not upon that portion of her person where the rupture was.

The plaintiff introduced in evidence, without objection, testimony of his family physician and others, that his wife, prior to April 30, 1891, had been of a naturally sanguine, cheerful temperament; and that since that time her disposition and general demeanor had undergone a change, so that she was depressed, nervous, and melancholy. The plaintiff contended that this change was due to the injuries, and should enter into the question of damages, as lessening the value of her society.

The defendant put in evidence, without objection, the record of the plaintiff's conviction, on September 18, 1890, of the offence of drunkenness.

The defendant then called as a witness one Quinn, the police officer who made the arrest on which such conviction was had, and, on direct examination, asked him to state the circumstances of the arrest.

The plaintiff objected, but the witness was permitted to testify that on the occasion of the arrest he was accosted, about eleven o'clock at night while on his beat, by one of three women who stood on the sidewalk in front of the plaintiff's house, and one of whom was the plaintiff's wife, but that he thought she did not herself call him; that, in consequence of what they said, he effected an entrance for them into the house, which was locked, and he found the plaintiff inside in an intoxicated condition; that he had a scuffle with him; that the plaintiff then, in his wife's presence, complained of her actions; and that he then arrested the plaintiff for drunkenness.

The defendant also called as a witness another police officer, one Ryder, who, against the plaintiff's objection, was permitted to testify that on two separate occasions, both shortly prior to the time of the arrest above mentioned, he had been called to the plaintiff's house, and had there found more or less confu-

sion, and the plaintiff in an intoxicated condition; and that, at the wife's request, he had endeavored to calm the plaintiff.

The plaintiff excepted to the admission of the evidence of both witnesses.

The evidence of Quinn and Ryder was introduced by the defendant in mitigation of damages, by tending to show such relations between husband and wife as indicated that the husband did not avail himself of the companionship and society of the wife, the loss of which was alleged, and prevented the same; and the judge in his charge instructed the jury to regard it only as bearing on the question of damages. The plaintiff excepted to this instruction.

There was no evidence in the case, otherwise than is above recited, that the plaintiff ever did or offered to do violence to his wife, or that their relations as husband and wife had ever been interrupted.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

N. D. Pratt, for the plaintiff.

G. F. Richardson, for the defendant.

HOLMES, J. The evidence objected to, whether admissible or not, was confined to the question of damages by the express and repeated directions of the judge. It was not let in generally, as in *Ellis v. Short*, 21 Pick. 142, *Crowell v. Porter*, 106 Mass. 80, and *Maguire v. Middlesex Railroad*, 115 Mass. 239. In *Brown v. Cummings*, 7 Allen, 507, the evidence was let in generally, and naturally would affect the amount of damages found by the jury. See *Anthony v. Travis*, 148 Mass. 53, 59. Ordinarily, it must be assumed that the jury follow the instructions which they receive. *Commonwealth v. Ham*, 150 Mass. 122. And although this assumption may not prevent the granting of a new trial when the inevitable effect of inadmissible evidence is to prejudice the objecting party's whole case and testimony, as in *Miller v. Curtis*, 158 Mass. 127, we do not regard such an effect as likely here. Evidence of disturbed marital relations at particular times had no bearing on the questions whether the plaintiff had lost his wife's services, or the defendant had been negligent.

Exceptions overruled.

JOHN CARMODY vs. BOSTON GAS LIGHT COMPANY.

JOHN CARMODY, JR. vs. SAME.

ALBERT CARMODY vs. SAME.

ANNIE CARMODY vs. SAME.

Suffolk. November 15, 1894. — January 2, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Injury from Escape of Gas — Negligence — Instructions.

A jury may find negligence from the breaking of a gas-pipe and the consequent escape of gas, but it is for them to say whether they will do so, and, if there are other circumstances in the case bearing on the question, they must weigh them all.

An instruction to the jury, in a case where a number of circumstances bearing upon a question of fact are in evidence, that a part of them are not of themselves sufficient to establish the fact, coupled with explicit instructions that they are to be considered, must be understood as directing the jury to weigh together all the pertinent circumstances, and not to draw their inference from a part without considering all.

FOUR ACTIONS OF TORT, for injuries occasioned to the respective plaintiffs by the escape of gas. The cases were tried together in the Superior Court, before *Dewey, J.*, who allowed a bill of exceptions, in substance as follows.

It appeared by evidence introduced in behalf of the plaintiffs that the injuries complained of were caused by the escape of gas into the plaintiffs' apartments from the defendant's pipes in the street, the plaintiffs inhaling the gas while asleep. The defective condition of the pipe, according to the plaintiffs' evidence, was that the pipe was rotten, and a large hole appeared there on the morning after the accident, which the witnesses testified was a foot long and two or three inches wide on the top of the pipe. It appeared further that there was no perceptible smell of gas in their rooms when the plaintiffs retired at about nine o'clock in the evening; that they were aroused by a neighbor at about midnight; that notice was sent to the defendant of the escape of gas by a police officer at half-past six o'clock the next morning; and that a competent man was at once sent by the defendant to investigate the leak, and gas was shut off from the whole dis-

trict by half-past seven o'clock. Evidence was introduced by the defendant tending to prove that the gas-pipe was properly laid; that it was a proper pipe, and, after it had been laid, a drain had been dug from the house occupied by the plaintiffs to the sewer in the middle of the street, without notice to the defendant; that the ground had settled under the gas-pipe where the drain was dug; and that the gas-pipe had been broken by the settlement of the ground under it, leaving that portion of the pipe without support. The portion of the pipe which was broken was introduced in evidence, and showed only a small crack running round it. There was no hole on the top of the pipe, as described by the plaintiffs' witnesses, and the pipe, except where the crack was, was in good condition.

The plaintiffs requested the judge to rule that there was evidence enough of want of proper care on the part of the defendant to make it responsible, on the ground that it was bound to conduct its gas in a proper manner; and that the fact that the gas escaped was *prima facie* evidence of some neglect on the part of the defendant.

The judge declined so to rule, and instructed the jury as follows :

"The mere fact that a pipe broke and the gas escaped is not of itself sufficient to establish the liability of the company. It is evidence for you to consider upon the question of neglect; but there is other evidence bearing upon this question of neglect, and so it becomes a matter for you to determine, in view of all the evidence bearing upon the question, the burden being upon the plaintiffs to satisfy you, as a result of all the evidence, that there was in fact a neglect by the defendant, through which, and by means of which, this gas escaped.

"Now, the law requires of the defendant that it shall use reasonable and proper care, under all the circumstances, in selecting its pipe, in laying its pipe, in taking care of it afterwards, looking after it; and this question of reasonable and proper care has reference, of course, to the kind of instrumentality that it was dealing with, and to the possible or probable consequences of neglect on its part. But the principle by which its conduct is to be regulated is one of reasonable and proper care under the circumstances; and that in this case, as in most of these cases, is a question for your judgment."

Upon the counsel for the plaintiffs remarking, "Your honor has not given the requests I asked for, and so I will except to that," the judge replied as follows: "Well, you asked me to say that the fact that the gas escaped is *prima facie* evidence of some neglect on the part of the defendant. I do not choose to use that expression, '*prima facie* evidence,' unless the defendant consents to it. I have already told the jury that it was evidence of neglect, or of negligence, on the defendant's part, and evidence the force of which it was for them to determine in connection with any other evidence in the case bearing upon the same subject."

The jury returned a verdict for the defendant; and the plaintiffs alleged exceptions.

C. P. Sullivan, for the plaintiffs.

C. P. Greenough & J. P. Parmenter, for the defendant.

BARKER, J. The plaintiffs asked the court to instruct the jury "that there was evidence enough of want of proper care on the part of the defendant to make it responsible, on the ground that it was bound to conduct its gas in a proper manner, and that the fact that the gas escaped was *prima facie* evidence of some neglect on the part of the defendant." This request was copied from a ruling given in *Smith v. Boston Gas Light Co.* 129 Mass. 318, where this court said of it that, as applied to the facts of that case, it could not be said to be wrong. The presiding justice in the present case declined to give the instruction, but instructed the jury in other terms, which fully and correctly dealt with the phases of the cause to which the request was addressed.

While the ruling requested is sufficiently correct if it be construed as declaring that there was enough evidence of want of proper care to be submitted to the jury, it would invade the proper province of the jury if it was understood by them to mean that there was evidence enough to require them to find the defendant negligent, and the presiding justice was not bound to give a ruling which, as applied to the case upon trial, might have been so understood. Nor was he bound to use the Latin phrase upon which the plaintiffs insisted, but might well say, in place of it, that the fact that gas escaped was evidence of neglect "and evidence the force of which it was for them to

determine in connection with any other evidence in the case bearing on the same subject."

The plaintiffs' exception did not go to the charge as given, but merely to the refusal of the request. They nevertheless argue that the statement of the charge, that "the mere fact that a pipe broke and the gas escaped is not of itself sufficient to establish the liability of the company," was incorrect. But there was evidence with which the jury had to deal tending to show that the defendant had used due care to conduct its gas in a proper manner, and that the escape of gas by which the plaintiffs were injured was due to the acts of third persons of which the defendant had no notice, and not to any negligence of the defendant.

It is apparent, from the situation of the evidence and the context of the charge, that the sentence to which the plaintiffs now object could not have been understood by the jury as forbidding them to draw the inference of negligence from the facts that a pipe broke and that gas escaped; but that, as there was other evidence bearing upon the question of negligence, they must consider and weigh it all, and not come to a conclusion upon two circumstances merely.

The true construction of the ruling asked, as applied to the case at bar, would be, that, as matter of law, the breaking of a pipe and the consequent escape of gas prove negligence. The true rule is, that a jury may find negligence from those circumstances, but it is for them to say whether they will do so; and, if there are other circumstances bearing on the question, they must weigh them all.

Instructions that evidence "is sufficient to show," or "has a tendency to show," or "is enough to show," or "is *prima facie* evidence of," are not to be understood as meaning that there is a presumption of fact, but that the jury are at liberty to draw the inference from them. *Commonwealth v. Clifford*, 145 Mass. 97. *Commonwealth v. Keenan*, 148 Mass. 470. And so the instruction in a case where a number of circumstances bearing upon a question of fact are in evidence, that a part of them are not of themselves sufficient to establish the fact, coupled with explicit instructions that they are to be considered, must be understood as directing the jury to weigh together all the pertinent circumstances, and not to draw their inference from a part without considering all.

Exceptions overruled.

DAVID S. SPAULDING vs. ETHAN A. SMITH & another.

Middlesex. November 16, 1894. — January 2, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Private Nuisance — “ Adjoining Property ” — Statute — Action.

The owner of land on one side and extending to the centre of a highway cannot, under St. 1887, c. 848, maintain an action against an owner of land on the opposite side and extending to the centre of the same highway, for maliciously maintaining, on the line of the highway opposite the plaintiff's land, a fence unnecessarily exceeding six feet in height, for the purpose of annoying the plaintiff.

TORT, under St. 1887, c. 848, for maliciously maintaining a fence unnecessarily exceeding the height of six feet on land adjoining that of the plaintiff, for the purpose of annoying him. At the trial in the Superior Court, before *Sheldon*, J., it appeared that the plaintiff was the owner in fee of a certain lot of land situate on the easterly side of a county road in Dracut, and the defendants were the owners in fee of another tract of land situate on the westerly side of the road and opposite that of the plaintiff, and that the road was forty-two feet wide.

It was agreed that the boundaries described in the respective deeds of the plaintiff and the defendants gave to each the fee in the road to the centre thereof, subject to the public easement.

The plaintiff proved all the facts necessary to enable him to maintain his action, provided the property of the plaintiff adjoined the property of the defendants within the meaning of the statute.

After the evidence was all in, the defendants asked the judge to rule that the respective properties did not so adjoin, and to direct a verdict for the defendants.

The judge so ruled, and directed the jury to return a verdict for the defendants; and the plaintiff alleged exceptions.

J. H. Morrison, for the plaintiff.

G. F. Richardson, for the defendants.

BARKER, J. A verdict was rightly ordered for the defendants. The fence which the plaintiff contends was a private nuisance

for which he has an action under the provisions of St. 1887, c. 348, was not a boundary fence between his lands and those of the defendants. It was upon the opposite side of the highway, at least twenty-one feet from the nearest part of his land, and separated from all his land which was not part of the highway by a space forty-two feet wide. It is true that he and the defendants own the soil of the highway subject to the public easement, each of the parties so owning to the centre of the way, and that in that sense they are owners of adjoining properties. But we think that the fence was not so situated with reference to the land of the adjoining owner, who complains that it is a private nuisance, as to be within the meaning of the statute.

In *Rideout v. Knox*, 148 Mass. 368, in holding the statute constitutional, it was said that it was at least doubtful whether the act applied to fences not substantially adjoining the injured party's land; and one reason given for sustaining the statute was because its curtailment of the rights of property was insignificant, the limitations imposed being small enough in degree to be upheld under the police power, while larger limitations of the rights of owners can be imposed only by the exercise of the right of eminent domain. To hold the fence of which the plaintiff complains to be within the meaning of the statute would, we think, be a greater limitation of the rights of owners than the Legislature intended to impose. *Exceptions overruled.*

FREDERICK A. ARMSTRONG vs. PETER FORG.

Middlesex. November 19, 1894. — January 2, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Personal Injuries occasioned to Boy — Instructions as to Use of Machine — Negligence — Due Care.

In an action for personal injuries occasioned to the plaintiff, a boy between fourteen and fifteen years of age, while in the defendant's employ by using a steam punching-machine, there was contradiction in the testimony in regard to the instructions given to the plaintiff as to the avoidance of danger in using the machine. *Held*, that, if the jury believed the plaintiff, they might well find

that there was negligence on the part of the defendant, and that it was also a question of fact for the jury whether the plaintiff, in view of his youth and inexperience, was in the exercise of due care.

TORT, for personal injuries occasioned to the plaintiff while in the defendant's employ. At the trial in the Superior Court, before *Sherman, J.*, the jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion.

J. Lowell, Jr., for the defendant.

J. J. Feely, for the plaintiff.

KNOWLTON, J. The plaintiff's finger was hurt in using a steam-power punching-machine. The question before us is whether there was any evidence to warrant the submission of the case to the jury. At the time of the accident the plaintiff was between fourteen and fifteen years of age. He was set at work on the machine in the afternoon and was hurt in the morning of the next day. The power was applied to the machine by placing the foot on a treadle, which would cause the press to come down with great force upon a piece of steel which was placed on a die, and which would be punched and bent into the desired shape by the operation. The treadle was so adjusted that, if the foot was placed on the treadle and immediately taken off, the press would come down once and go up and stop, but if the foot was kept on the treadle it would keep coming down and going up continuously. There was contradiction in the testimony in regard to the instructions given to the plaintiff, but if the jury believed him they were warranted in finding that he was not told, and did not know, that if he kept his foot on the treadle the press would keep coming down and going up, and that he was not told how to take the piece of steel out of the press after it was punched, but saw the person who set him at work do it with his fingers. He testified that after he had been working about two hours the piece of steel kept sticking to the punch, that he told the engineer, who came and sat down at the machine and tried it, and that afterwards, when the plaintiff was using his finger to get the piece of steel out, the press came down and caught the finger.

The jury, if they believed the plaintiff, might well find that there was negligence on the part of the defendant in not telling

him how to avoid danger in the use of the machine. We are of opinion that it was also a question of fact for the jury whether the plaintiff, in view of his youth and inexperience, was in the exercise of due care. *Exceptions overruled.*

PATRICK J. HAYES vs. EDWARD G. NORCROSS & another.

Suffolk. November 20, 1891. — January 2, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Personal Injuries — Child injured while Crossing a Street — Negligence — Due Care.

If at the trial of an action for personal injuries occasioned to the plaintiff, a boy five years and six months old, by being run over by the defendant's team, the conduct of the plaintiff was such as the judgment of common men would universally condemn as careless in any child of sufficient age and intelligence to be permitted to go alone across a street on which teams are frequently passing, he was not in the exercise of due care and cannot recover.

TORT, for personal injuries occasioned to the plaintiff by being run over by the defendants' team. At the trial in the Superior Court, before *Maynard, J.*, the defendants, at the close of the evidence, requested the judge to direct a verdict in their favor. The judge so directed a verdict; and the plaintiff alleged exceptions.

S. D. Charles, for the plaintiff.

G. Cunningham & R. F. Herrick, for the defendants.

KNOWLTON, J. There was no evidence that the driver drove over the plaintiff wantonly, and the evidence of negligence on his part was slight, and was contradicted, but we may assume that on this part of the case the plaintiff was entitled to go to the jury. The most important and difficult question in the case is whether there was any evidence that the plaintiff was in the exercise of due care. The circumstances attending the accident, so far as they are material to this question, are clearly shown and undisputed. The accident happened on Hudson Street in Boston on the 14th of October, at about five o'clock in the

afternoon. The street has an asphalt pavement, and most of the buildings upon it are dwelling-houses. There was evidence from a policeman called by the plaintiff that there is much driving upon it, and that there had been frequent complaints of fast driving. The plaintiff was five years and six months old. His mother testified that at his request she had given him permission to go across the street to play with another boy in the yard of a neighbor, and that she had often told him not to play upon the street. The burden was on the plaintiff to establish by affirmative evidence facts which would warrant the jury in finding that he was in the exercise of due care. Inasmuch as his mother, who was his custodian, permitted him to go across the street unattended and come back in the same way, he cannot maintain his case without proving that he was of such intelligence and experience that he might properly be permitted to go back and forth across the street alone. If we assume in his favor that the jury might find this from his age, and from such other circumstances as were shown, the finding necessarily involves a finding that he knew something of the danger of being run over by passing teams, and of the necessity of trying to avoid them. Unless he had such knowledge, his mother was negligent in letting him go out alone, and her negligence would prevent his recovery. If the jury might find that he had such knowledge, and that boys of his age usually have it, is there anything in the evidence to show that he used such care as ordinarily careful boys of his age are accustomed to use under like circumstances? The defendants' team was a common covered grocery wagon drawn by a single horse, and was driven at a trot, according to the testimony, at the rate of about five or six miles an hour. It was near the sidewalk on the side of the street at the right of the driver, the witnesses estimating the distance from the walk variously from eighteen inches to five feet. It was in the daytime, and there was nothing to prevent the plaintiff from seeing it. He started from the sidewalk on the right of the horse to get across the street, came in contact with the horse's fore legs, was thrown down on the right hand side of the horse, and was run over by the wheels on the right hand side of the wagon. One of the witnesses said, "He started on the run across the street." There was other testimony to the same effect, and none in contradiction

of it. There was nothing to show a reason for his starting then, instead of waiting until the team had gone by.

From the time he started he went not more than five or six feet at most before he came in contact with the horse's legs. The horse must therefore have been very near when he started. He fell between the horse and the sidewalk, and the evidence indicates that he darted out quickly and ran against the horse. There is no view that can be taken of any of the testimony which would warrant a finding that he was ordinarily careful. That there may be other boys who carelessly expose themselves on the streets does not help him in his suit. While he is only bound to show that he exercised such care as ordinary boys of his age and intelligence are accustomed to exercise under like circumstances, the standard is the conduct of boys who are ordinarily careful. In *Collins v. South Boston Railroad*, 142 Mass. 301, 315, is this language: "It would seem that, if children unreasonably, intelligently, and intentionally run into danger, they should take the risks, and that children, as well as adults, should use the prudence and discretion which persons of their years ordinarily have, and that they cannot be permitted with impunity to indulge in conduct which they know, or ought to know, to be careless, because children are often reckless and mischievous."

Upon the undisputed facts, the conduct of the plaintiff in this case was such as the judgment of common men would universally condemn as careless in any child of sufficient age and intelligence to be permitted to go alone across a street on which teams are frequently passing. *Messenger v. Dennie*, 137 Mass. 197; *S. C.* 141 Mass. 335. *Casey v. Smith*, 152 Mass. 294.

Exceptions overruled.

CALISTA A. GEYETTE, administratrix, vs. FITCHBURG
RAILROAD COMPANY.

Suffolk. November 20, 21, 1894. — January 2, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

*Loss of Life — Railroad — Due Care — Conjectural Manner of Death
— Action.*

When a railroad freight train, consisting of two engines, twenty-two cars, and a caboose, reached a certain station in the night-time, a brakeman, whose position was on the forward part of the train, was sent forward by the conductor with orders for the engineers. As the train went on towards the next station it broke apart, leaving a portion of the cars attached to the engines, and the other cars and the caboose separated therefrom. After the train had passed this station, the brakeman, who was on the last engine looking out, said that he could not see the red light on the rear of the train, and then started back with his lantern along the top of the moving train to see if it had broken apart. The night was very dark and foggy. He was not seen alive after that, but his dead body was found in the centre of the track between the rails; and there were indications that he struck on his feet between the tracks and was run over by that part of the train which was detached from the engines. *Held*, in an action against the railroad corporation for causing his death, that there was no evidence of due care on his part; and that the action could not be maintained.

TORT, under the employers' liability act, St. 1887, c. 270, by the administratrix of the estate of John A. Morris, for causing his death. Trial in the Superior Court, before *Dunbar, J.*, who ruled that the plaintiff could not maintain her action, and directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions. The facts appear in the opinion.

B. C. Moulton, for the plaintiff.

G. A. Torrey, for the defendant.

KNOWLTON, J. The plaintiff, as next of kin, seeks to recover damages under the employers' liability act, St. 1887, c. 270, for the death of her son, John A. Morris, of whose estate she has been appointed administratrix.

To maintain an action under this statute it is necessary to prove that the employee was in the exercise of due care. He was a brakeman on a freight train of the defendant, and was run over and killed at about four o'clock in the morning of the 9th of March, 1892, by a part of the train on which he was

riding. The train consisted of two engines, twenty-two cars, and a caboose. His position as brakeman was on the forward part of the train. The train broke apart, leaving thirteen cars attached to the engines, and nine cars and the caboose in the part broken off. At Ashburnham Junction the conductor sent Morris forward with orders for the engineers, and saw him walking up the track to give them. The train went on through North Ashburnham towards Winchendon, and there was evidence tending to show that it broke apart a little before reaching North Ashburnham. There was evidence that, just after passing North Ashburnham, Morris was on the last engine looking out, and saying that he could not see the red light on the rear of the train. He then went back to see if the train had broken apart. This was a proper thing for him to do. It was then very dark and foggy. He was not seen alive after that, but his dead body was found in the centre of the track between the rails. There were indications that he struck on his feet between the tracks, and was run over by that part of the train which was detached from the engines.

If we assume in favor of the plaintiff that the separation of the parts of the train was caused by the negligence of the engineers, we find no evidence of due care on the part of Morris. His position immediately before the accident was one calling for great care. He started with his lantern on a dark and foggy night, along the top of a moving train of freight cars, to see if at any point the train had broken apart. As he approached the rear end of each car, he had no means of judging, except as he could see, whether the next car was connected with the one on which he was walking, or was following it at a distance behind. We have nothing but conjecture to guide us in trying to determine what his conduct was from the time he left the engine until he was run over. Perhaps it is a probable inference that he walked or fell off from the end of the last car of the forward part of the train; but there is no ground whatever for any inference other than mere conjecture in regard to the particulars of his conduct immediately before the accident. It would seem that if he had been going carefully, looking out to see whether there was a car behind attached to that on which he was walking, he would not have fallen from the rear of the for-

ward part of the train, and that if he had been using proper care he would not have fallen at any other point. The circumstances of the case, so far as they are disclosed, point to nothing but his own carelessness as the proximate cause of the accident. At most, the breaking apart of the train was only the remote cause, and no other culpable cause is shown in the conduct of any of the defendant's servants or agents. The immediate cause grew out of the conduct of the plaintiff's intestate, and the burden is on the plaintiff to show that his conduct was free from negligence or fault. She has failed to sustain the burden, and the case is governed by *Chandler v. New York, New Haven, & Hartford Railroad*, 159 Mass. 589, a case which is very similar to this in its facts. See also *Tyndale v. Old Colony Railroad*, 156 Mass. 503; *Irwin v. Alley*, 158 Mass. 249; *Felt v. Boston & Maine Railroad*, 161 Mass. 311.

The case differs from those in which the plaintiff is shown to have been in the performance of his duty a short time before the accident, under circumstances which did not call for any positive act of care in reference to the force which caused the accident. *Maguire v. Fitchburg Railroad*, 146 Mass. 379. *Maier v. Boston & Albany Railroad*, 158 Mass. 36. In *Thyng v. Fitchburg Railroad*, 156 Mass. 18, at the moment when the train broke apart the plaintiff was in the performance of his duty at the precise point where it separated, and he had no occasion to take precautions against a danger which he had no reason to anticipate.

Exceptions overruled.

HENRY W. PUTNAM vs. JOSIAH H. GUNNING.

Suffolk. November 21, 1894. — January 2, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Beneficiary Association — Evidence — Wrongful Receipt of Funds by Officer of Corporation — Fraud.

In an action by the receiver of a fraternal beneficiary association incorporated under St. 1888, c. 429, as amended by St. 1890, c. 341, to recover money alleged to have been wrongfully taken by the defendant from the funds of the corporation while a director thereof, documents and papers on which appear the signature or initials of the defendant in his own handwriting, wherein he is referred to as holding a certain office, are admissible in evidence to show that he was such an officer of the corporation.

In an action by the receiver of a fraternal beneficiary association incorporated under St. 1888, c. 429, as amended by St. 1890, c. 341, to recover money alleged to have been wrongfully taken by the defendant from the funds of the corporation while a director thereof, an extract from a pamphlet is competent evidence, in connection with testimony that thousands of the pamphlets were being issued from the office of the corporation while the defendant was holding a certain office and afterwards, to show that he knew, as stated in such extract, that the reserve fund was held out to the members of the corporation and to the public as a trust fund for the payment of matured certificates, and that it could not be appropriated to any other use, and also to show that in like manner the proceeds of the monthly *per capita* tax and of the assessments were all to be deposited in securities with the Treasurer of the Commonwealth or held as a part of the reserve fund.

In an action by the receiver of a fraternal beneficiary association incorporated under St. 1888, c. 429, as amended by St. 1890, c. 341, to recover money alleged to have been wrongfully taken by the defendant from the funds of the corporation while a director thereof, there was evidence that the semiannual *per capita* taxes for payment of expenses were sent directly to the secretary general of the corporation, and did not go to the treasurer general; and it appeared that the defendant received his payments through the treasurer general. *Held*, that, while the evidence in regard to the fund from which the payments of the money which the plaintiff sought to recover were made was not direct and clear, the jury might fairly infer that it was the reserve fund.

At the trial of an action by the receiver of a fraternal beneficiary association incorporated under St. 1888, c. 429, as amended by St. 1890, c. 341, to recover \$1,500 alleged to have been wrongfully taken by the defendant from the funds of the corporation while a director thereof, there was evidence that he was an officer of the corporation for two years from its organization; that he was a director, and received his salary as such up to the time of the receivership; that on a certain day he made a contract with the corporation to continue for eighteen months from that date to promote the growth and well being of the corporation in certain States, in such form and manner as he should be directed from time to

time by certain officers of the corporation, at an annual salary of \$1,500, to be paid him by the corporation; that on a certain day he received \$500 from the corporation before any part of this salary had become due, and at the time of the payment, when asked by the bookkeeper what it was for, replied that "he would tell him what it was for at some future time," and that he said "he was in a tight place and had got to use the money"; that about three weeks later he received \$500, which he receipted for on account of salary, and two months afterwards he received \$500 more; that there had previously been talk by the defendant, or by other officers of the corporation in his presence, as to the likelihood of the corporation being stopped very soon; and that a fund of \$10,000 had been set apart by the directors two or three months before for the purpose of perpetuating and defending the corporation. There was also evidence tending to show that the defendant did little or nothing under his contract; and that the payments, by direction of the principal officer, had been charged up to a certain publication as for services of the defendant as editor and publisher. The defendant afterwards told the bookkeeper that the entry on the books should be changed, as the money was paid to him not for the publication, but for lecturing for the corporation and promoting its interest. All this time his salary as director was paid to him separately, and he was preaching regularly on Sundays at a church in another State. The defendant did not testify, nor offer any explanation of these matters. *Held*, that the case was rightly submitted to the jury.

CONTRACT, by the receiver of the Supreme Lodge American Protective League, a fraternal beneficiary association incorporated under St. 1888, c. 429, as amended by St. 1890, c. 341, to recover \$1,500 alleged to have been illegally and fraudulently taken by the defendant from the funds of the corporation while a director thereof. At the trial in the Superior Court, before *Maynard, J.*, the jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion.

F. Hutchinson, for the defendant.

H. W. Putnam, (*W. H. Brown* with him,) *pro se*.

KNOWLTON, J. Many documents and papers were introduced in evidence on which appeared the signature or initials of the defendant in his own handwriting, wherein he was referred to as governor general, or director, or member of the committee on finance of the American Protective League, the corporation of which the plaintiff is receiver. These were objected to by the defendant. They were admitted to show that during all the time from its organization he was acting for the corporation, and was familiar with its business, and also as evidence that he was an officer of the corporation, at least *de facto*. In this way the plaintiff also sought to connect him with the issuing of the

pamphlet "Live to Win," of which great numbers were being issued during all the time that the corporation was doing business. The evidence was clearly competent. The defendant's own acts and declarations can be proved against him to show that he was an officer of a corporation, as well as for any other purpose. 1 Greenl. Ev. § 195, and cases cited. *Smith v. Palmer*, 6 Cush. 513. *Loomis v. Wadhams*, 8 Gray, 557. *Topping v. Bickford*, 4 Allen, 120. *Commonwealth v. Kane*, 108 Mass. 423. *Commonwealth v. Tobin*, 108 Mass. 426. The extract from the pamphlet "Live to Win" was competent evidence,* in connection with the testimony that thousands of these pamphlets were being issued from the office of the corporation while the defendant was governor general and afterwards, to show that he knew the reserve fund was held out to the members of the corporation and to the public as a trust fund for the payment of matured certificates, and that it could not be appropriated to any other use, and also to show that in like manner the proceeds of the monthly *per capita* tax and of the assessments were all to be deposited in securities with the Treasurer of the Commonwealth, or held as a part of the reserve fund. See St. 1890, c. 341, § 1. The evidence in regard to the fund from which the payments of the amounts which the plaintiff seeks to recover were made is not direct and clear, but the jury might fairly infer that it was the reserve fund. There was testimony that the semiannual *per capita* taxes for payment of expenses were sent directly to the secretary general, and did not go to the treasurer general; and it appeared that the defendant received his payments through the treasurer general.

* The material portion of this extract was as follows:

"Reserve Fund. At least fifty per cent of the *per capita* tax and assessments is invested in proper securities, as the law directs, and deposited in trust with the Treasurer of Massachusetts, to be used only for the payment of matured certificates. The balance will be used to pay sick and accident benefits, and the surplus will be covered into the reserve fund. These benefits are constant payments on account, and are thus constantly lessening final liabilities.

"No portion of the reserve fund can be drawn except upon requisition, signed by three fourths of the executive committee and indorsed by the insurance commissioner of the State, setting forth that the same is to be used only for the purpose of the trust, namely, the payment of maturing certificates."

The defendant contends that there was no evidence that he received the money wrongfully or in fraud of the corporation. There was evidence that he was governor general of the corporation from its organization in June, 1889, until June, 1891; that he was a director, and received his salary as director up to the time of the receivership; that on January 1, 1892, he made a contract with the corporation to continue for eighteen months from that date to promote the growth and well being of the order in the States of New York and New Jersey, in such form and manner as should be directed from time to time by the governor general or the secretary general, at a salary of fifteen hundred dollars per year, to be paid him by the corporation; that on March 23, 1892, he received five hundred dollars from the corporation before any part of this salary had become due, and at the time of the payment, when asked by the bookkeeper what it was for, replied that "he would tell him what it was for at some future time"; that he said "he was in a tight place, and had got to use the money"; and that afterwards, on April 14, he received five hundred dollars, which he receipted for on account of salary, and again on June 14 he received five hundred dollars more. It was also in evidence that there had previously been talk by the defendant, or by other officers of the league in his presence, as to the likelihood of the league being stopped very soon, and that a fund of \$10,000 had been set apart by the directors two or three months before for the purpose of perpetuating the league and defending it. There was also evidence tending to show that he did little or nothing under his contract, and that the payments by direction of the governor general had been charged up to the "Endowment Review," as for services of the defendant as editor and publisher. The defendant afterwards told the bookkeeper that the entry on the books should be changed, as the money was paid to him, not for the "Endowment Review," but for lecturing for the league and promoting its interest. All this time his salary of \$125 per quarter as director was paid to him separately, and he was preaching regularly on Sundays at a church in another State. The defendant did not testify nor offer any explanation of these matters. We are of opinion that this testimony, in connection with the other evidence in the case, was proper for the consideration

of the jury on the question whether the defendant did not, while a director of the company, connive with the other managing officers to obtain money of the corporation without consideration and against right. The facts established by the witnesses, especially when taken in connection with the defendant's failure to testify, open a wide field for legitimate inferences against one who had long been a prominent officer of a corporation which can now make but small returns to those who invested their money in it. We are of opinion that the presiding justice was right in submitting the case to the jury.

Exceptions overruled.

GEORGIA A. AMORY vs. INHABITANTS OF MELROSE.

HARRIET E. HILL vs. SAME.

Middlesex. November 22, 1894. — January 2, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Land Damages — Expert — Evidence.

Whether or not a person called as an expert witness shall be allowed to testify to his opinions in a case, while largely within the discretion of the presiding judge or officer, is yet a question of fact for his decision.

At the trial of a petition for the assessment of damages for the taking of land to widen a street in a town in the vicinity of Boston, a person was called as an expert witness who had been long engaged in the real estate business in Boston, and was also an auctioneer. He had been making foreclosure sales in the vicinity of Boston for twenty years, and testified that he had sold land in all parts of the town in question; that he might have made twenty-five or thirty sales there, or double that number; and that he had made public sales of real estate in almost every town in the vicinity of Boston. Another person, also called as an expert witness, who had been in the real estate business for more than twenty years, although he had never bought or sold land in the town in question, testified that he had been familiar with the value of real estate in the vicinity of Boston, and with the cutting up of real estate. *Held*, that it could not be said, as matter of law, that the judge erred in finding the witnesses to be qualified as experts.

At the trial of a petition for the assessment of damages for the taking of land to widen a street in a town, a witness, who on his direct examination had testified to the price paid two months before the taking for a vacant lot in the vicinity of the land taken on the same street, was asked, on cross-examination, what price was paid two months after the taking for a large lot of land, upon which were a house and a stable, directly opposite the other lot testified to. This evi-

dence was excluded. *Held*, that it could not be said, as matter of law, that the judge erred in finding that the lot as to which the evidence was offered was not sufficiently similar to the petitioner's land, and in excluding the evidence.

BARKER, J. These cases were petitions for the assessment of damages for the taking of land from the front of the petitioners' house lots to widen a street. The respondent now contends that two persons were improperly allowed to testify as experts, and that a witness who testified as to the price of a lot of land in the vicinity was not allowed, in answer to questions of the respondent, to testify what price was paid for another lot directly across the street from the former.

Whether or not a person called as an expert witness shall be allowed to testify to his opinions in a case, while largely within the discretion of the presiding judge or officer, (see *Tucker v. Massachusetts Central Railroad*, 118 Mass. 546,) is yet a question of fact for his decision.

We think there was no error in admitting the witnesses as experts, and that it cannot be said that, when it became the duty of the presiding justice to pass upon the question, he could not in law, upon the evidence before him, find the question of fact in favor of the petitioners. The subject of investigation before the jury was the amount of damage occasioned by the widening of a street to land and buildings situated in the vicinity of Boston. It involved, besides the value of the land taken, the damage or benefit to the remaining lands, and to some extent the cost of retaining walls and of the removal of buildings. The two persons called as experts had each been long engaged in the real estate business in Boston, and one was also an auctioneer. He had been making foreclosure sales in the vicinity of Boston for twenty years, and testified that he had sold land in all parts of Melrose, saying that he might have made twenty-five or thirty sales in Melrose, or double that number, and that he had made public sales of real estate in almost every town in the vicinity of Boston. The other witness had been in the real estate business since the year 1870, and although he had never sold or bought land in Melrose, testified that he had been familiar with the value of real estate in the vicinity of Boston, and with the cutting up of real estate. In our opinion, these facts showed such an extensive knowledge of the value of real estate in the locality,

and such an extensive experience in dealing with it, as to make it impossible for us to say that, as matter of law, in finding as a fact that the witnesses were qualified as experts, the presiding justice was wrong. Very much must in such cases be left to the experience and the practical sense and judgment of the magistrate who sees the witness and can form a judgment whether he magnifies or modestly depreciates his special knowledge and experience.

The remaining exception is to the exclusion of evidence as to the price paid for a lot of land on the same street with the petitioners' land, and not far away. This lot was sold in April, 1892, and was seventy-five feet wide upon the street and nearly three hundred feet deep, and had upon it a house and a stable. The question as to the price paid for it was asked in the cross-examination of a witness who had testified upon direct examination to the price paid in December, 1891, for a vacant lot directly opposite upon the same street. The taking for which the damages were claimed was on February 13, 1892.

The respondent proposed to show what the buildings on the lot sold in April, 1892, were worth, and that, not valuing the buildings at any price, the whole price paid was much less per foot than the price which the witness testified that land in that section was worth. As this lot was upon the same street and in the same vicinity with the lands of the petitioners, and the sale was quite near in point of time, the admissibility of the evidence depended upon the finding of the presiding justice as to whether the lot was in fact sufficiently similar to the lands of the petitioners. *Paine v. Boston*, 4 Allen, 168. *Shattuck v. Stoneham Branch Railroad*, 6 Allen, 115.

We cannot say, as matter of law, that he was wrong in finding that the lot was not sufficiently similar, and in excluding the evidence.

Exceptions overruled.

F. S. Hessel tine, for the respondent.

W. B. Stevens, for the petitioners.

EDWARD E. RICE vs. CAMILLE D'ARVILLE.

Suffolk. December 7, 1894. — January 2, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Contract of Hiring — Enforcement of Negative Covenant — Equity — Inability of Plaintiff to perform — Offer of Bond.

A negative covenant in a contract of hiring will not be enforced where, if the court had the power, it would not enforce an affirmative covenant.

A., a theatrical manager, and B., a singer, entered into a written contract, by the terms of which A. engaged B. to render services to him for a certain period at a stated salary. The contract also contained the provisions that B. "hereby agrees to render said services to the best of her ability at any theatre desired by" A. "in a correct and painstaking manner"; and that B. "hereby agrees that she will not render services at any other place of amusement . . . from the date of the commencement of this contract to its close, except those under the management of" A. After the contract was executed, but before it was operative, A. became indebted to B. for services rendered under a previous contract, and was unable to pay her, and would be unable to perform his part of the second contract unless the theatrical season proved successful. B. repudiated this contract, and entered into an engagement with another manager. A. thereupon brought a bill in equity to restrain B. from singing except under his management, and, at the hearing, a bond to the satisfaction of the court for the performance of A.'s part of the contract was offered by him. *Held*, that the bill could not be maintained.

Inability on the part of the plaintiff to perform his part of an agreement is a good ground for refusing to enforce the agreement against the defendant in a bill in equity for specific performance.

After one party to a contract has, for good cause, refused to perform his part, and has entered into other engagements, the offer by the other party of a bond for the performance of his part of the contract is of no effect.

LATHROP, J. This is a bill in equity, filed on September 18, 1894, to restrain the defendant from performing or singing at any theatre or place of amusement in the United States or Canada, except under the management of the plaintiff. On November 27, 1893, the plaintiff and the defendant entered into a contract by the terms of which the plaintiff engaged the defendant as prima donna of his company, to render services at such theatres, opera-houses, and halls as required, beginning on or about September 17, 1894, and to continue for a season of thirty-five weeks, or more, at the option of the plaintiff. For this he agreed to pay her \$450 a week when in New York or

Boston, and \$500 a week elsewhere. The plaintiff was also to pay railroad and steamboat transportation, but not carriage hire. The contract also contained these clauses: "And said Camille D'Arville hereby agrees to render said services to the best of her ability at any theatre desired by said Rice in a correct and painstaking manner. . . . Said Camille D'Arville hereby agrees that she will not render services at any other place of amusement in the United States or Canada, from the date of the commencement of this contract to its close, except those under the management of" the plaintiff.

The contract also contained an agreement as to the years 1895 and 1896.

The single justice of this court who heard the case has found that, when this contract was made, the defendant was performing for the plaintiff under an earlier and similar contract; that although at the time the contract of November, 1893, was signed nothing was due the defendant, the plaintiff soon after began to run behind with her salary, and now owes her some thousands of dollars, which he is unable to pay, and which he told the defendant he was unable to pay before she refused to go on under the present contract; and that the defendant's chance of getting her pay, so far as the plaintiff is concerned, would depend upon the success of the season, and perhaps on other elements.

At the hearing, a bond to the satisfaction of the court for the performance of the plaintiff's undertaking in this contract was offered by him.

Before the filing of the bill, the defendant repudiated the contract, and entered into an engagement with another manager.

The defendant is found to be a singer of established reputation in comic opera, and of such excellence that in a commercial sense her loss to the plaintiff would be irreparable, though there is at least one comic opera singer in this country who has as high or a higher rank.

It is conceded that the court has no power to enforce the affirmative covenant in the agreement; but the plaintiff contends that the negative covenant should be enforced. The effect of this would be to compel the defendant either to perform for the plaintiff or to remain idle. The principal authority in favor of the plaintiff's contention is the case of *Lumley v.*

Wagner, 1 DeG., M. & G. 604, which has lately been followed to some extent in this country, contrary to earlier cases, and has been much criticised in England. See *Beach*, Eq. §§ 604, 605; *Fry*, Spec. Perf. (3d ed.) §§ 860-862; *Davis v. Foreman*, [1894] 3 Ch. 654.

We have no occasion, however, at present to determine whether we should in any case enforce a negative covenant in a contract of hiring, when we had no power to enforce a positive covenant; as we are of opinion that in the case at bar this power should not be exercised.

We are not disposed to enforce a negative covenant, where, if the court had the power, it would not enforce an affirmative covenant. Suppose the owner of a parcel of land should covenant to sell it for a certain price, and should also covenant not to sell it to any one else, and when the time came for performance the covenantee was unable to pay for it. Here the court would certainly dismiss a bill for specific performance, whether it sought to enforce the affirmative or the negative covenant.

Taking this to be the rule, it seems to us plain that, in the case at bar, the court would not, if it had the power, enforce the affirmative covenant. Without regard to the failure of the plaintiff to perform his previous contract with the defendant, the only inference which can be drawn from the findings of the justice who heard the case is that the plaintiff is unable to perform his part of the contract, and will be unable to perform it unless the season proves successful. The defendant ought not to be subjected to this contingency. Nor ought the court, by enforcing the negative covenant, to compel her to be so subjected, or to remain out of employment.

Inability on the part of the plaintiff to perform his part of an agreement is a good ground for refusing to enforce the agreement against the defendant in a bill in equity for specific performance. *Carter v. Phillips*, 144 Mass. 100, 102. *Willingham v. Joyce*, 3 Ves. 168. *Franklin v. Brownlow*, 14 Ves. 550. *Price v. Assheton*, 1 Y. & C. Ex. 441. *M'Nally v. Gradwell*, 16 Ir. Ch. 512, 519.

The fact that the plaintiff at the hearing offered a bond for the performance of his contract makes no difference. This was offered after the defendant, for good cause, had refused to con-

tinue with the plaintiff, and had entered into other engagements. Besides, a bond is not an assurance that the money will be paid when due according to the terms of the contract, but an agreement which usually has to be enforced by a lawsuit.

Bill dismissed.

J. H. Blanchard, for the plaintiff.

A. H. Hummel (of New York) & *R. T. Babson*, for the defendant.

MICHAEL F. TRACY & another vs. SAMUEL T. WATERS
& trustee.

Middlesex. December 14, 1894. — January 2, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Trustee Process — Assignment — "Services" under Contract.

An assignment of all claims for money due and to become due for "services" rendered under a contract for the erection of a house includes claims for money due for expenditures under the contract, as well as for labor performed thereunder.

TRUSTEE PROCESS. Writ dated January 5, 1888. The defendant was defaulted. A. C. Webber, summoned as trustee, admitted that, at the time of service upon him, there was in his hands the sum of \$25 due the defendant. Edward B. James appeared as claimant of the funds in the hands of the trustee, by virtue of an assignment to him, under seal, dated July 13, 1887, signed by the defendant, and duly recorded, of all claims and demands which the defendant then had and might at any time have against the trustee for all sums of money due and to become due "for services rendered under my contract" with the trustee.

Trial in the Superior Court, without a jury, before *Blodgett*, J., who reported the case for the determination of this court, in substance as follows.

It was admitted that the defendant made a contract in writing with the trustee to erect a house for him in Cambridge; that, for the purpose of securing payment to the claimant for lumber

and materials furnished and to be furnished by him for the house described in the contract, the defendant, on July 13, 1887, gave to the claimant the assignment above mentioned; and that the contract mentioned in the assignment was the defendant's contract with the trustee above referred to. The writ was served upon the trustee on January 5, 1888, and there was then due to the claimant for lumber and materials furnished to the defendant a sum largely in excess of the funds in the hands of the trustee, the funds being the money which had become due to the defendant under the contract between him and the trustee.

The plaintiffs requested the judge to rule that the assignment covered only so much as became due to the defendant under his contract with the trustee for labor performed by the defendant, or, at the most, only so much as became due to the defendant for labor performed and furnished by him thereunder. The judge declined to rule as requested; ruled and found that the claimant was entitled to the funds in the hands of the trustee; and ordered that the trustee be discharged.

If the ruling was erroneous, a new trial was to be granted; otherwise, judgment was to be entered in accordance with the finding.

I. F. Sawyer, for the plaintiffs.

C. T. Gallagher & H. R. Bailey, for the claimant.

BARKER, J. The defendant had assigned to the claimant all his rights to any money due or to become due to the defendant for services under the contract. The meaning of the word "services" is broad enough to include expenditures as well as labor. See *Somers v. Keliher*, 115 Mass. 165, 167.

Judgment discharging the trustee to be entered in accordance with the finding.

SELECTMEN OF NORWOOD, petitioners.
NEW YORK AND NEW ENGLAND RAILROAD COMPANY,
petitioner.

Norfolk. December 14, 1894. — January 2, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Abolition of Highway and Railroad Crossings at Grade — Decision of Commissioners — Decree — Order for doing Work of Alterations — Appointment of Auditor.

Under St. 1890, c. 428, § 8, the Superior Court has authority to embody in a decree, confirming the decision of the commissioners appointed to prescribe the alterations of certain crossings of highways in a town by a railroad at grade, an order that the railroad company and the town "shall forthwith proceed to carry out the work of abolishing the grade crossings of said railroad at" the highways named "in the way and manner set out in the report of said commissioners"; and has authority also, under § 7 of the statute, to embody in such decree the appointment of an auditor, to whom shall be submitted all accounts of expenses incurred in doing the work.

THREE PETITIONS, under St. 1890, c. 428, for the abolition of certain grade crossings in the town of Norwood. After the former decision, reported 161 Mass. 259, the case came on to be heard in the Superior Court upon the question of entering a decree on the decision of the commissioners.

The decree, after reciting the previous proceedings in the cause, contained the following provisions:

"It is now, after a full hearing of the parties, hereby ordered, adjudged, and decreed that the decision of said commissioners as to Washington, Chapel, and Guild Streets, as shown and set out in their report, be and the same is hereby affirmed, and that the said company and the said town of Norwood shall forthwith proceed to carry out the work of abolishing the grade crossings of said railroad at Washington Street, at Chapel Street, and at Guild Street, in the way and manner set out in the report of said commissioners.

"And that Albert E. Avery, of Braintree, in said county, be and is hereby appointed auditor, to whom from time to time shall be submitted all accounts of expense, whether incurred by

said road, said town, commission, or auditor, who shall audit the same, and make report thereon to the court."

From this decree the railroad company appealed to this court. The grounds of the appeal appear in the opinion.

F. A. Farnham, for the railroad company.

KNOWLTON, J. The appellant objects to the decree of the court on two grounds: first, that it directs "that said company and the said town of Norwood shall forthwith proceed to carry out the work of abolishing the grade crossings of said railroad at Washington Street, at Chapel Street, and at Guild Street, in the way and manner set out in the report of said commissioners"; and, secondly, that it appoints an auditor to whom shall be submitted all accounts of expenses incurred in doing the work.

The decree in regard to carrying out the work simply states the legal duty which would be imposed by the statute if the decree were silent in regard to it. But the act contains this express provision: "The Superior Court, or any justice thereof sitting in equity in any county, shall have jurisdiction to compel compliance with this act, and with the decrees, agreements, and decisions made thereunder; and may issue and enforce such interlocutory decrees and orders as justice may require." St. 1890, c. 428, § 8. This authorizes the making of an order for doing the work at the time of confirming the decree of the commissioners, as well as afterwards.

Section 7 of the statute expressly authorizes the appointment of an auditor. The appointment in this case was properly made, and properly embodied in the decree confirming the decision of the commissioners.

Decree affirmed.

DAVID J. BOYD vs. HARRY C. GREENE & another.

Essex. November 7, 1894. — January 3, 1895.

Present: FIELD, C. J., ALLEN, KNOWLTON, & BARKER, JJ.

Sale by Auction — Statute of Frauds — Agreement — Highest Bid — Action.

If the jury find that the talk between a bidder and the auctioneer, at an auction sale of real estate, amounted to an agreement by the auctioneer to knock down the property to the bidder if he should bid a certain amount, and that was the highest amount bid, the agreement is within the statute of frauds, and an action by the bidder will not lie to recover damages for a breach thereof.

FIELD, C. J. The defendants were real estate brokers, and announced by publication in the newspapers and by the posting of placards that at a time named they would sell certain real estate described therein on the premises, by public auction, to the highest bidder without reserve; and the plaintiff, relying on such announcement, was present at the time and place named, and the property was put up for sale by an auctioneer, and bids were received, and the plaintiff made the highest bid, but the property was not knocked down to him, but was withdrawn from sale by the defendants. The breach of contract alleged in the declaration is the refusal of the defendants to sell the property at auction to the highest bidder, who was the plaintiff. The exceptions recite that the plaintiff bid \$1,725 for the property; that the auctioneer said to him, "I don't like to accept an additional bid of only \$25, will you make it \$1,750 if I will knock the property down to you provided you are the highest bidder?" that the plaintiff first said "No," then said, "Yes, I will," and bid \$1,750; that the auctioneer then announced the bid as \$1,750, and then called for further bids, but none were made; that the auctioneer then consulted with the defendants (who were present), and then announced that the property could not be sold for \$1,750, and the sale was then declared adjourned indefinitely.

The defendants asked the court to rule that the statute of frauds was a bar to the action, and that, if the talk between the plaintiff and the auctioneer amounted to an agreement, no suf-

ficient consideration was shown to make it a contract binding on the defendants. The court refused so to rule. It does not appear that the statute of frauds had been pleaded, but we do not think that the refusal of the court to rule as requested proceeded on that ground.

The exceptions also recite as follows: "The court, subject to the objection and exception of the defendants, instructed the jury, in substance, that it was for them to say whether said talk between the plaintiff and the auctioneer, and their action aforesaid under the circumstances aforesaid, were understood by them as an agreement by the auctioneer to knock down said property to the plaintiff if he was the highest bidder therefor, and that, if they so found, they should find for the plaintiff for the difference between \$1,750 and the real value of the property. No question was raised concerning the readiness of the plaintiff to comply with the terms of the contract. No other questions were submitted to the jury." The jury found for the plaintiff.

It is evident from the exceptions that the decision of the case turns upon the question whether the talk between the plaintiff and the auctioneer could properly be found to constitute a contract for the breach of which this action can be maintained. The contention of the plaintiff in effect is, that, although a contract for the sale of lands is within the statute of frauds, a contract to make a valid contract for the sale of lands with the highest bidder at public auction is not.

The strongest case for the plaintiff is *Warlow v. Harrison*, 1 El. & El. 295, 309. There the plaintiff had a verdict in the Queen's Bench, and leave was given to the plaintiff to amend his declaration if the court should think fit, and to the defendant leave was given to move to enter a verdict for him or a nonsuit, and a nonsuit was entered. In the Exchequer Chamber, to which the case was carried, it was said that, although on the pleadings the nonsuit was right, yet, on the facts of the case, if the plaintiff elected to amend his declaration, he was entitled to recover, and judgment was entered affirming the judgment of the Court of Queen's Bench unless the parties elected to enter a *stet processus*, or the plaintiff amended his declaration, in which latter case a new trial was to be had. The case was of the sale by auction of a mare, for which the plaintiff bid sixty guineas,

and the owner of the mare bid sixty-one guineas, and the mare was knocked down to the owner. The statute of frauds was not pleaded. Martin, B., speaking for himself and two other judges, says: "We think the auctioneer who puts the property up for sale upon such a condition [the condition that it shall be sold without reserve] pledges himself that the sale shall be without reserve; or, in other words, contracts that it shall be so; and that this contract is made with the highest *bona fide* bidder; and, in case of a breach of it, that he has a right of action against the auctioneer. The case is not at all affected by the seventeenth section of the statute of frauds, which relates only to direct sales, and not to contracts relating to or connected with them." Willes, J. and Bramwell, B. put the decision on the ground "that the defendant undertook to have, and yet there was evidence that he had not, authority to sell without reserve." This case has been cited in *Mainprice v. Westley*, 6 B. & S. 420; *Harris v. Nickerson*, L. R. 8 Q. B. 286; *Horsey v. Graham*, L. R. 5 C. P. 9; and in *Ex parte Asiatic Banking Co.* L. R. 2 Ch. 391; but not upon the question whether the contract to be implied was within the statute of frauds, and the case generally appears not to have been regarded as an absolutely authoritative decision of the matters upon which the judges of the Exchequer Chamber expressed an opinion.

The case at bar is not an action to recover for the trouble and expense of attending the auction under the inducement held out by the defendants in their advertisement. See *Harris v. Nickerson*, *ubi supra*. It is an action to recover damages because the defendants, through their agent, the auctioneer, did not sell the property to the plaintiff, or did not do what was necessary to make a valid sale of the property to him, as they had agreed to do. The damages recovered are the difference between the sum bid and the value of the property. The jury must have found that the defendants, through their agent, the auctioneer, impliedly promised the plaintiff that if he would bid \$1,750 for the property, and if this was the highest bid, the property should be knocked down to him, and a sufficient memorandum in writing of the sale should be made by the auctioneer, and that the defendants broke this promise. Is such a promise within the statute of frauds? A contract to make a will of real property in favor of

another person is within the statute of frauds, although a contract to leave a certain amount of money by will to such a person is not. *Gould v. Mansfield*, 103 Mass. 408. *Wellington v. Apthorp*, 145 Mass. 69. A contract to execute a bond of defeasance or a deed of reconveyance by the grantee of an absolute conveyance of real property is within the statute of frauds. *Boyd v. Stone*, 11 Mass. 341. *Ahrend v. Odiorne*, 118 Mass. 261.

There are certain contracts which have been held to be only collateral to a contract for the sale of land, and so not within the statute; but an oral contract to execute a valid written agreement to convey land is, we think, as much within the statute as an oral contract to execute and deliver a deed of the land. *Lawrence v. Chase*, 54 Maine, 196. *Richards v. Richards*, 9 Gray, 313. *Browne*, St. of Frauds, § 266.

We think that the court should have ruled that the talk between the plaintiff and the auctioneer, even if it amounted to a contract, was within the statute of frauds.

Exceptions sustained.

C. H. Conant, for the defendants.

J. P. Sweeney, for the plaintiff.

ELIJAH B. DOLLOFF vs. INHABITANTS OF AYER.

Essex. November 8, 1894. — January 3, 1895.

Present: FIELD, C. J., ALLEN, KNOWLTON, & BARKER, JJ.

Use of Another's Property by a Town — Express or Implied Contract.

If a person's hose gets mixed with that of a town and the fire department uses it in connection with the town hose in extinguishing fires, supposing that it belongs to the town, an action against the town for the use of the hose will not lie, if no actual contract was made by the town and there were no circumstances from which a contract with the town might be inferred.

CONTRACT. The declaration alleged that on or about June 1, 1879, the plaintiff "leased to the defendant town five hundred feet of two and one half inch leather hose, which the defendant town kept under said leasing for the term of eight years, for

which it owes him the sum of three hundred and seventy-five dollars, with interest from the first day of June, 1887, when said contract was terminating and payment of said sum demanded, amounting to one hundred and sixteen dollars and twenty-five cents, being in all the sum of four hundred and ninety-one dollars and twenty-five cents." The answer was a general denial. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, on agreed facts, the material portions of which appear in the opinion.

C. U. Bell, for the plaintiff.

W. H. Atwood, for the defendant.

FIELD, C. J. The agreed statement of facts shows that no actual contract of any kind was made with the plaintiff by anybody purporting to act for the defendant. The selectmen refused to buy the hose, and never agreed to pay for the use of it. The engineers of the fire department never agreed to buy it or to pay for the use of it, and apparently did not know that there was any hose belonging to the plaintiff in their possession or in the possession of the defendant. Upon the plaintiff's representation that they had possession of his hose, they gave him permission to take any hose that he could find belonging to him from the hose reel. No refusal appears on the part of any officer of the defendant to prevent the plaintiff from taking and carrying away his hose if he could find it, and there is nothing in the agreed facts from which any concealment of the hose on the part of officers of the defendant can be inferred. It is agreed that "the hose was not distinguishable from other hose owned by the town, except by a name stamped upon the coupling in letters less than one sixteenth of an inch in size, and this mark was not known to either of the parties until about the time the hose was delivered back to the plaintiff."

The duty of the board of engineers with reference to buying or replacing hose and other fire apparatus is defined in Gen. Sts. c. 24, § 29; Pub. Sts. c. 35, § 34; but the engineers never attempted to act under these provisions of the statutes. The plaintiff on paying his debt to Page, to whom the hose had been pledged, could have demanded of him the hose, and on his refusal to deliver it could have recovered of him its value as for a conversion. But the defendant town never claimed title to

the hose, or the right of possession of or the right to use the hose, and could not well be held to have converted it.

The case against the defendant is in substance this. The plaintiff's hose got mixed with the town hose, and the fire department used it in connection with the town hose in extinguishing fires without knowing that it belonged to the plaintiff, but supposing that it belonged to the town. Whether the engineers in doing this committed a tort for which they are liable, it is unnecessary to determine. The town is not liable for the torts of the engineers of its fire department. *Fisher v. Boston*, 104 Mass. 87. *Pettingell v. Chelsea*, 161 Mass. 368. No contract to pay for the use of the hose can be implied when it is plain that the selectmen were unwilling to make an express contract to pay for the use, and when the engineers did not know that they were using the plaintiff's hose, and therefore did not know that they were receiving a benefit for the town from this use which the town ought to pay for. See *Ladd v. Rogers*, 11 Allen, 209; *Day v. Caton*, 119 Mass. 513; *Earle v. Coburn*, 130 Mass. 596.

Judgment affirmed.

JOSEPH R. BEHARRELL vs. HENRY B. QUIMBY.

Middlesex. November 13, 1894. — January 3, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Construction of Contract — Certificate of Architect — Law and Fact — Waiver — Finding.

A. and B. executed a written contract, by the terms of which A. was to erect a house on B.'s land for a certain sum, which was to be paid in three instalments, the second payment to be made "when all is completed," and providing that "in each of the said cases the architect shall certify in writing that all the work upon the performance of which the payment is to become due has been done to his satisfaction"; and that no certificate "except the final certificate" should be conclusive evidence of the performance of the contract, either wholly or in part, against any claim of the owner. No certificate was given for the first payment, but the architect gave a certificate reciting that A. was entitled to a certain sum, "being the second payment on the contract." *Held*, that this certificate was not a final one, within the meaning of the contract.

If a contract for the erection of a house provides that the consideration is to be

paid in three instalments, that a certificate of the architect is to precede each payment, and that no certificate except the final one is to be conclusive evidence of the performance of the contract, and an auditor, to whom an action on the contract brought before a final certificate has been furnished by the architect is referred, finds that such certificate was not fraudulently or capriciously withheld, although he reports some facts tending to show the contrary, but which are not conclusive, this court cannot say, as matter of law, upon a report of the case by a judge who found for the defendant, that a sufficient reason or excuse for failing to produce a final certificate from the architect was made out; nor are payments made before and upon the furnishing of a certificate by the architect that the contractor is entitled to the second payment, to be deemed, as matter of law, a waiver of a further certificate.

- A. and B. executed a written contract, by the terms of which A. was to erect a house on B.'s land for a certain sum, which was to be paid in three instalments, the second payment to be made "when all is completed," and the final payment thirty days after the completion of the work, "provided that in each of the said cases the architect shall certify in writing that all the work upon the performance of which the payment is to become due has been done to his satisfaction." The contract also recited that "no certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, against any claim of the owner"; and that the owner "hereby contracts to pay the same at the time, in the manner, and upon the conditions, above set forth." No certificate was given for the first payment, but the architect gave a certificate reciting that A. was entitled to a certain sum, "being the second payment on the contract." About a month before this certificate was given, C. signed an agreement, which, after reciting that "there is now due to" A. from B. "a sum of money under and by virtue of a certain written contract," covenanted that, for considerations stated, C. would pay to A. "all sums of money now due and to become due to him under said contract according to the tenor thereof." On the day this agreement was dated a first payment was made to A.; ten days later a further payment was made; and about twenty days after this a third payment was made, the architect's certificate above mentioned being furnished on that day. About a month later, no further certificate having been given, A. brought an action on C.'s agreement. The judge, who tried the case without a jury, found for the defendant, on the ground that the action was prematurely brought. *Held*, that this finding was warranted by the evidence.

CONTRACT, upon a written agreement, dated March 22, 1892, reciting that "there is now due to Joseph R. Beharrell from Edward R. Orcutt a sum of money under and by virtue of a certain written contract," by the terms of which the plaintiff undertook, "for a consideration therein specified to be paid by said Orcutt at the times and in the manner therein mentioned," to erect a dwelling-house on Orcutt's land; that the defendant had taken from Orcutt a deed of such land; and that the plaintiff had, at the defendant's request, refrained from attaching the property "for the sum due him under said contract"; and cov-

enacting, in consideration of the premises, that the defendant would pay to the plaintiff "all sums of money now due and to become due to him under said contract according to the tenor thereof"; and signed by the defendant. The case was referred to an auditor. Trial in the Superior Court, without a jury, before *Bishop, J.*, who found for the defendant; and, at the request of the parties, reported the case for the determination of this court. If the ruling of the judge was wrong, and if, upon the evidence, the plaintiff was entitled to recover, judgment was to be entered in his favor; otherwise, judgment was to be entered for the defendant in accordance with the finding. The facts appear in the opinion.

F. W. Qua, for the plaintiff.

H. L. Boutwell, for the defendant.

ALLEN, J. The only two questions reported for our determination are, (1) whether the ruling as to the certificate was wrong, and (2) whether upon the evidence the plaintiff was entitled to recover.

1. The ruling that the certificate given by the architect was not a final certificate, within the meaning of the agreement between the plaintiff and Orcutt, was right. By that agreement three certificates were called for, one before each payment. The certificate given was for the second payment. Although no certificate had been given for the first payment, the certificate for the second necessarily implied that the plaintiff was entitled to the first payment.* The plaintiff also contends that, since the contract provided for the second payment only "when all is completed," the certificate that he was entitled to that payment implied that all had been completed, and that no further certificate was necessary. But by the terms of the contract no certificate except the final one was to be conclusive evidence of the performance of the contract, either wholly or in part, against any claim of the owner. A final certificate was called for, which was to be in addition to the two earlier certificates.

* This certificate, which was dated April 16, 1892, and signed by the architect, was as follows: "This is to certify that Mr. Joseph R. Beharrell is entitled to five hundred dollars, being the second payment on the contract dated December 24th, '90, with Mr. E. R. Orcutt, for the erection of a dwelling-house at South Lowell, Mass."

2. In dealing with the question whether, upon the evidence, the plaintiff was entitled to recover the final payment, we will first consider whether he would be entitled to maintain an action for that payment against Orcutt himself. By the terms of the contract, Orcutt was entitled to a final certificate of the architect before making the final payment. The several payments were to be made, "provided that in each of the said cases the architect shall certify in writing that all the work upon the performance of which the payment is to become due, has been done to his satisfaction. . . . No certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, against any claim of the owner." The owner "hereby contracts to pay the same at the time, in the manner, and upon the conditions, above set forth." No later certificate was given than that for the second payment. The plaintiff therefore was not entitled to recover against Orcutt the final payment, unless some sufficient reason or excuse for not furnishing such a certificate was shown. What would amount to such sufficient reason or excuse has often been considered, both in England and in this country, as appears by the authorities cited for the plaintiff and for the defendant, to which may be added *Clarke v. Watson*, 18 C. B. (N. S.) 278; *Batterbury v. Vyse*, 2 H. & C. 42; *Nolan v. Whitney*, 88 N. Y. 648; *United States v. Robeson*, 9 Pet. 319, 327; *Hudson's Law of Building Contracts*, 265, 297-301. The plaintiff contends that there was evidence from which the court would have been amply justified in finding that the provision requiring a certificate, if it ever constituted a condition precedent, had been waived; and also that the evidence showed that the certificate had been wrongfully and fraudulently withheld. All that is open to us, on this part of the case, is to determine whether at the trial and upon the evidence introduced, that is, upon the auditor's report, the presiding justice was bound to find that there was a sufficient reason or excuse for not producing such a certificate. He found for the defendant; and his finding must stand unless we can say, upon the evidence, that it was wrong. There was evidence which certainly tended to show that the architect might well have given a final certificate; that he

changed his mind to some extent shortly after giving the certificate for the second payment; and that he wrongfully withheld it. There was also some evidence of circumstances tending more or less to show that Orcutt interfered to prevent the architect from giving the final certificate, and, if this latter proposition had been made out, the plaintiff clearly would have been relieved from the necessity of producing such a certificate. Whether such a result would follow from the mere wrongful refusal of the architect alone is a question upon which elsewhere there has been some difference of opinion. Hudson's Law of Building Contracts, 301. *Nolan v. Whitney*, 88 N. Y. 648. We need not now determine it. There was nothing to show that the plaintiff ever asked the architect to give a final certificate, or complained to Orcutt that the architect was acting unfairly. The report of the auditor upon this whole subject is rather vague and unsatisfactory, but it was accepted by the parties, and neither of them offered to produce further evidence, except that of the documents. The certificate for the second payment was dated April 16, 1892, but the auditor reports that it was given April 23, 1892. The action was begun on May 31, 1892. It is stated that at the hearing before the auditor the architect did not appear, and that it was admitted that he had been absent from Lowell in parts unknown for several months. We have no means of knowing the date of the hearing before the auditor. There is no averment or suggestion, and we cannot infer, that the architect went away before the commencement of the action. The auditor expressly finds that it was not alleged nor proved that the architect had fraudulently or capriciously withheld a final certificate; and although he reports some facts tending to show the contrary, yet they are not conclusive, and they do not enable us to say, as matter of law, that a sufficient reason or excuse for failing to produce a final certificate from the architect was made out. Nor were the payments which were made to be deemed, as matter of law, a waiver of a further certificate.

The plaintiff, however, contends that the defendant under his contract is not entitled to avail himself of this defence, although it might be open to Orcutt. This contention rests upon the language of the defendant's contract, reciting that "there is now due to Joseph R. Beharrell from Edward R. Orcutt a sum

of money under and by virtue of a certain written contract." The contract of the defendant was dated March 22, 1892, and at that time no certificate had been given by the architect, and the plaintiff contends that the recital above quoted shows that the parties did not contemplate the furnishing of an architect's certificate at that time. But the final payment under the contract with Orcutt was not to be made till thirty days after the completion of the work, and the earliest date named by the plaintiff as the time when the work had been completed was March 22, 1892. The recital that a sum of money was then due certainly could not have been intended to include the final payment. The defendant's promise was to pay "all sums of money now due and to become due to him under said contract according to the tenor thereof." As to sums to become due in the future, at least, this must mean a promise to pay according to the obligation that would be resting on Orcutt. What was actually done in making payments was this. On March 22 a first payment of five hundred dollars was made; on April 2 there was a further payment of four hundred and nine dollars; and on April 23 there was a further payment of five hundred dollars, the architect's certificate being furnished on said last named day. By whom these payments were made, whether by Orcutt or by the defendant, is not stated, but the plaintiff assumes that they were made by the defendant. If this were so, it still appears probable that the last payment was not made till the architect's certificate was furnished, and the plaintiff virtually admits that this was so. There is nothing sufficient to control the plain words of the defendant's promise, which was to pay the money to become due under the contract according to the tenor thereof. This obviously means that the defendant would pay such sums as became due from Orcutt, and at the time when they so became due. The final payment would not become due from Orcutt without a final certificate from the architect, unless some sufficient reason for failing to produce such certificate should be shown. The finding of the presiding justice was based on the ground, as we understand it, that the plaintiff's action was prematurely brought. This finding was warranted by the evidence. The result is that there must be, according to the terms of the report,

Judgment for the defendant.

HOWARD H. WILLCOX & another vs. LOUIS W. ARNOLD
& others.

Suffolk. November 14, 1894. — January 3, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Unincorporated Association — Contract — Agent acting within Scope of his Employment.

In an action against the members of a college class, for work done and materials furnished in the publication of a book, there was evidence from which the court might infer that the defendants voted at a class meeting to publish the book, or assented to the vote, and elected as "business manager of the publication" A., one of their number, who made with the plaintiff the contract in suit. The court found for the plaintiff. *Held*, that the contract was within the scope of A.'s employment, and that the defendants had no ground of exception.

CONTRACT, for work done and materials furnished by the plaintiffs for the defendants. Trial in the Superior Court without a jury, before *Hopkins, J.*, who found for the plaintiffs, and the defendants alleged exceptions, in substance as follows.

The Class of 1893 of Tufts College, including all of the defendants and others except one Gifford, at a class meeting duly called voted to publish a volume to be called "The Brown and Blue," and elected the defendant Arnold as business manager of the publication. The class also elected certain other of the defendants as editors of the publication, and the defendant Arnold made with the plaintiffs, who were printers, a written contract for the publication of the book. Certain additions to and changes in the terms of the contract were subsequently made at the request of Arnold; and the plaintiffs by letter to Arnold stated that they intended to hold him personally responsible for the debt to them. The plaintiffs performed their part of the contract according to its terms as modified by the additions and alterations aforesaid, and delivered the publication to Arnold.

There was evidence offered by the plaintiffs tending to show that Arnold told them, when making the contract, that he rep-

resented the class ; that Martin, one of the defendants, at some time subsequent told them the class stood behind Arnold ; that DeGoosh, also one of the defendants, at some time subsequent told them " we know we owe you a large amount " ; that the plaintiffs gave credit to the class ; and that all of the defendants except Gifford were present at the class meeting at which Arnold was elected business manager.

There was evidence offered by the defendants tending to prove that they never authorized the defendant Arnold to pledge their credit for the publication of the book ; that they never instructed him as to its publication ; that he never reported to the class what he had done until he reported that he had not received from sales of the book enough to meet the expenses ; that he never consulted with any other of the defendants as to the book, but himself fixed its price and the charge for advertisements, and determined the number of copies to be published ; that he sold the copies at a uniform price ; that none of the defendants received a copy free, and that he drew no money from the class treasury for expenses, or for any of the purposes of the publication ; that thereafter, at a class meeting, Arnold reported that he had not collected enough to pay the plaintiffs' bill, and asked the class to help him out ; and that thereupon the class voted to raise a certain sum of money to help him make up his deficit to the plaintiffs.

The defendants asked the judge to rule that there was no evidence to warrant a finding against any of the defendants, except Arnold. The judge refused so to rule, and found for the plaintiffs against all of the defendants except Gifford, and found for the defendant Gifford.

D. T. Montague, for the defendants.

J. J. Higgins, for the plaintiffs, was not called upon.

FIELD, C. J. The evidence was sufficient to warrant the finding of the court. It was competent for the court to infer from all the evidence that the defendants who were present at the class meeting at which it was voted to publish a volume to be called " The Brown and Blue " either voted to publish the volume or assented to the vote. This is also true of the vote by which Arnold was elected " business manager of the publication." The contract made by Arnold was apparently within

the scope of his employment, at least the court could so find.
Newell v. Borden, 128 Mass. 31. *Ray v. Powers*, 134 Mass. 22.
Exceptions overruled.

JAMES B. COLE vs. BENJAMIN HADLEY.

Middlesex. November 15, 1894. — January 3, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

*Deed — Easement — Right of Way — Contract to work Way for Travel —
Estoppel — Statute of Frauds.*

The grantee of land bounded on a street owned by the grantor and extending to a public street acquires by his deed a right of way to the latter street over the grantor's land as the way is defined on that land when the deed is delivered, but the grantor is not bound to work the way so that it shall be fit for travel, unless he has promised so to do; and such promise may be shown by oral evidence.

The grantee of land bounded on a private street acquires by estoppel a right of way in the street against the grantor and his heirs and assigns only when the grantor owns the street or has the right to grant such an easement in it; and an oral agreement by the grantor to give the grantee a right of way over land of other persons is within the statute of frauds, Pub. Sts. c. 78, § 1, cl. 4.

FIELD, C. J. This is an action of contract to recover damages for the breach of an alleged agreement to lay out and construct a certain private way of the width of thirty-five feet in Everett, called Ashton Street. We construe the alleged agreement to be an agreement to lay out and construct such a way for the use of the plaintiff in connection with the lot of land conveyed to him. The defendant conveyed to the plaintiff a lot of land by deed dated November 10, 1891, and delivered on or about July 26, 1892. The description of the land in the deed so far as material is as follows: "Beginning on Ashton Street so called, leading out of Ferry Street at a point 110.9 feet distant northeasterly from the intersection of the southerly line of Ashton Street with the northeasterly line of Ferry Street; thence running northeasterly by the southeasterly line of Ashton Street fifty feet; thence southeasterly at right angles with Ashton Street 132.3 feet more or less, to land formerly of Oakes, now of Ellen Rus-

sell; thence," etc. The defendant owned a strip of land thirty feet wide on the northwesterly front of the lot conveyed extending to Ferry Street, but beyond this thirty-foot strip the land belonged to other persons. The defendant testified "that he agreed to grade down the said street called Ashton Street, and to give a strip of land thirty feet wide for the same, but did not agree to build the same of any specified width," and he offered evidence that he had graded the street to about the grade of Ferry Street, which was a public street, making excavations in some places of ten feet in depth, and had wrought the way "so that, allowing for the slope of the bank, the width of the travelled part of the way varied when complete from about twenty-five to twenty-eight feet between the plaintiff's lot and Ferry Street." The plaintiff testified that the defendant agreed "to put in a street there thirty-five feet wide," and offered evidence that the way which had been built was "about the same as a pasture or potato bed." There was no written agreement or memorandum in relation to the laying out or building of the street except the description of the land in the deed, which has been quoted. The width of Ashton Street was not given in the deed, and there was no reference to any plan or to the street except in the description of the lot of land. The plaintiff testified that when the agreement was made there was no street, but simply a field or pasture. When the deed was delivered, the street apparently had been sufficiently wrought to define its width on the ground.

The defendant's counsel requested, among others, the following instructions to the jury: "That an agreement to sell a right of way or easement in Ashton Street, or Cole Avenue, is an agreement to sell an interest in land, and by the statute of frauds must be in writing, and signed by the defendant or by some person by him duly authorized. That as to the plaintiff's rights in Ashton Street, or Cole Avenue, so called, the deed from the defendant to the plaintiff must determine the plaintiff's right, and a previous verbal agreement or understanding, if any, was by the acceptance of the deed waived or merged therein; at all events, that the facts are evidence of a waiver." The court refused to give these instructions, and the defendant excepted. The bill of exceptions recites that the court instructed the jury

on the subject of waiver, and gave other instructions appropriate to the case, to which no exception was taken.

The plaintiff by his deed acquired a right of way by estoppel over Ashton Street as it existed on the grantor's land at the time of the delivery of the deed, and it was competent to show by oral evidence that the defendant promised to grade and work this street so that it should be fit for travel. *Durkin v. Cobleigh*, 156 Mass. 108. But by the deed the plaintiff acquired no right of way over the land of other persons than the grantor, and an agreement by the defendant to give the plaintiff a right of way over the land of other persons is within the statute of frauds, as a contract for the sale of an interest in land. An easement of a right of way can be created only by grant or prescription. *Morse v. Copeland*, 2 Gray, 302. It is by estoppel that the grantee of land bounded on a street gains a right of way in the street against the grantor and his heirs and assigns, and this only when the grantor owns the street, or has the right to grant a right of way in the street. If the grantor does not own the way or street, there is no implied covenant that there is such a way or street. *Howe v. Alger*, 4 Allen, 206. As the alleged agreement extended beyond the right of way created by the estoppel, we think that the exceptions should be sustained, although the precise point we have decided does not appear very clearly in the exceptions.

Exceptions sustained.

D. P. Bailey, for the defendant.

J. H. Fiske, for the plaintiff.

MARY E. GRAY vs. GEORGE W. PARKE.

Suffolk. November 15, 1894. — January 3, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Malicious Prosecution — Guardian and Ward — Probable Cause for Making a Complaint.

An action for malicious prosecution will not lie against the guardian of an insane person for making complaint against the plaintiff for entering the dwelling-house of the ward after having been forbidden by the guardian so to do.

TORT, for malicious prosecution. At the trial in the Superior Court, before *Blodgett*, J., the plaintiff offered evidence tending to show that she had long resided in Foxborough, and was the niece of Elizabeth Gray, who was more than ninety years of age and lived in a house on Green Street in Cambridge; that prior to the summer of 1890 she had been in the habit of visiting her aunt at her house in Cambridge, and that the relations between them were friendly; that during the summer and autumn of 1890 Elizabeth was an invalid, and confined to her room; that in April, 1890, the defendant was appointed by the Probate Court of the County of Middlesex guardian of Elizabeth, who was adjudged to be an insane person, and continued to be such guardian at the time of the criminal prosecution complained of in this action; that late in the summer of 1890 the plaintiff received a message from her aunt requesting her to call upon her, and went to the house in Cambridge and was admitted by the housekeeper, who was employed as such by the defendant; that the housekeeper showed her a letter from the defendant to the housekeeper, which the plaintiff read, and which contained, among other things, these sentences: "From the time you receive this letter, none of the Grays of Foxborough, their wives or families, can go into that house or see Aunt Elizabeth again until my legal duty in the matter is ended. . . . If any person attempts to go into the house or to go upstairs without your consent, you must call a policeman. . . . The Grays of Foxborough can see this, but it is not best to have it taken away." The

plaintiff admitted that she understood from this letter that she was forbidden by the defendant, as guardian of Elizabeth Gray, to visit her aunt at her house in Cambridge, and she testified that at the time when the letter was shown to her she left the house without visiting her aunt's room. The plaintiff further testified that early in October, before the 20th, she again went to the house of her aunt in Cambridge, upon her aunt's invitation, and after some talk with the housekeeper, who again called her attention to the prohibition in the defendant's letter, went to her aunt's room, saying that her aunt wanted to see her, and she would take the responsibility, and that she remained with her aunt about fifteen minutes.

The plaintiff and one Maria Murdock, called by her, admitted on cross-examination that they knew that the defendant asserted that their visits to his ward and their conversations with her made the ward ill.

On October 20, 1890, the defendant made complaint against the plaintiff to the Third District Court of Eastern Middlesex, which recited that the plaintiff "did enter the dwelling-house of one Elizabeth Gray, . . . having been heretofore forbidden to enter said dwelling-house by said George W. Parke, the guardian of said Elizabeth Gray, he the said Parke having then and there the lawful control of said dwelling-house." The plaintiff appeared to answer, and the case was continued from time to time until February 25, 1891, when the case was dismissed, the docket entry being, "Case dismissed, both parties being in court, and neither objecting." The plaintiff offered evidence tending to show that after the dismissal of the case the defendant said, in the presence of the plaintiff, that he did not care about the result of the criminal prosecution; that he had accomplished what he had set out to do, which was to keep the plaintiff from the house.

At the close of the plaintiff's evidence, the judge having intimated that the plaintiff had failed to show that there was no probable cause for the prosecution, the plaintiff contended that the prohibition by the defendant against the plaintiff's visiting her aunt was not made in good faith, and was an unreasonable and improper prohibition to be made; and requested the judge to rule that she had a right to have this question determined by the

jury, and, further, that if the defendant made the prohibition in bad faith, it could not be said that the defendant had probable cause for making the complaint.

The judge declined so to rule, and ruled that, upon the evidence and facts as before stated, the defendant had probable cause for making the complaint, and directed the jury to return a verdict for the defendant. The plaintiff alleged exceptions.

D. O. Allen, for the plaintiff.

C. P. Sampson, for the defendant.

HOLMES, J. The guardian of an insane person has the management of all that person's estate. Pub. Sts. c. 139, § 11. Management means control, as that word is used in St. 1890, c. 410. A stranger who enters the ward's dwelling-house against the direct prohibition of the guardian is liable to the fine imposed by the last mentioned act. The defendant directly forbade the plaintiff to enter his ward's dwelling-house, and she entered in spite of his order. Therefore, so far as appears, if the complaint against her had been tried, she must have been found guilty. The defendant not only had probable cause for making the complaint, but had a good case. The plaintiff asked to go to the jury on the question whether the prohibition was reasonable and in good faith. On the evidence, we suppose this means that the plaintiff wished to argue that the defendant's interest was to keep her from seeing his ward for some self-seeking motive, the ward being an invalid and confined to her room. But there was no evidence that the defendant restrained his ward's person, and his power over the house was not dependent upon or affected by any motive for exercising it of which there is evidence.

Exceptions overruled.

ANASTASIA HARDIMAN vs. FRANK Q. BROWN.

Suffolk. November 15, 1894. — January 3, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Expert — Answer to Hypothetical Question.

In an action for personal injuries occasioned to the plaintiff's intestate by being struck and run over by a horse with a sleigh attached, a post-mortem examination more than four years thereafter revealing tumors in the cerebellum, a good practising physician of long experience who knows what the authorities say in regard to tumors may properly be permitted to answer in the following manner a hypothetical question as to the exciting cause of the illness of the plaintiff's intestate, viz.: "From the result of the autopsy, knowing that there was a tumor of the brain, I presume that was the exciting cause of the troubles from which he suffered," although in his practice he had not been familiar with tumors on the brain and did not pretend to understand the cause of tumors.

A doctor of medicine may be competent to express an opinion upon the effect of pressure at the base of the brain, whether it arises from tumors or other causes, although he may never have been called to a case where tumors were known to exist there, and in determining the qualifications of a physician the extent of his reading in his profession may be considered as well as his experience.

TORT, for personal injuries occasioned to the plaintiff, on January 9, 1887, by being struck and run over by a runaway horse with a sleigh attached, driven by the defendant. The plaintiff having died, the action was prosecuted by her administrator. At the trial in the Superior Court, before *Maynard, J.*, the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, the nature of which appears in the opinion.

F. S. Hessel tine & N. F. Hessel tine, for the defendant.

J. F. Wiggin & B. M. Fernald, for the plaintiff.

FIELD, C. J. The question put to Dr. Clark called for an opinion upon "the exciting cause of the illness" from which the plaintiff suffered from January 9, 1887, till her death on May 18, 1892. The nature of the illness was described in the question.* The answer of Dr. Clark was: "From the result of the

* The question, which was based on the evidence in the case, was as follows: "Suppose a girl between seven or eight years of age, who had always been in good health, on the 9th of January, 1887, to have been run over by a runaway horse with sleigh attached, to have been knocked insensible to the ground, the horse and sleigh passing over her, inflicting three

autopsy, knowing that there was a tumor of the brain, I presume that was the exciting cause of the troubles from which she suffered." The exceptions recite that, when Dr. Clark was called as a witness, "the counsel for the defendant, upon being asked by the counsel for the plaintiff if he wanted him to qualify him, said, 'Not at all, — I admit Dr. Clark is a good physician'; and later said, 'You do not understand I admit he is an expert on tumors; I admit him to be a good practising physician, a graduate from a good institute, and of long experience.'" The exceptions also recite that, "before the hypothetical question was put to Dr. Clark, he was asked if he was familiar with tumors of the brain, to which he replied that he was not. He was then asked if he knew what caused tumors, to which he answered that he did not mean to be understood that he understood the causes of tumors; that he knew what the authorities said in regard to them; that the causes were chiefly unknown; to which question and answer no objection was made. The presiding justice ruled that the fact that he did not pretend to know anything about tumors, and the fact that there was a tumor there, did not preclude him from answering the hypothetical question, but ordered the following portion of his answer to be stricken out: 'As to what was the cause of the tumor, as I have said before, the causes are chiefly uncertain. Tumors are caused from injuries to the brain.'"

The counsel for the defendant contends that Dr. Clark was not shown to be qualified to answer as he did the hypothetical question put to him, and the question before us is whether it ap-

cuts, one upon the top, one upon the side, and one upon the back of her head, from the hoofs of the horse or otherwise; that she thereafter was attacked with vomiting, and was confined to the house for two months, suffering great pain in the back and front of the head; that at intervals thereafter, increasing in frequency and intensity till the date of her death on May 18, 1892, she was attacked with violent pains in the head, accompanied with vomiting; that in the last few months of her life her sight gradually failed, and she became totally blind; that her legs became unsteady, and her control over them uncertain; that she suffered almost continuously great pain in the front and back of the head; that after her death, upon examination, it was found that she had one or more tumors of the cerebellum, or at the base of the brain. What, in your opinion, was the exciting cause of the illness from which she suffered from January 9, 1887, the date of the accident, till the date of her death, May 18, 1892?"

pears that the justice presiding at the trial erred, as matter of law, in finding on the evidence recited in the exceptions that Dr. Clark was qualified to give the answer he gave. *Quinsigamond Bank v. Hobbs*, 11 Gray, 250. *Perkins v. Stickney*, 132 Mass. 217. We think that a good practising physician of long experience, who knew what the authorities said in regard to tumors, could properly be permitted to answer the question as Dr. Clark did, although in his practice he had not been familiar with tumors on the brain, and did not pretend to understand the cause of tumors. Dr. Clark was not permitted to give any opinion upon the cause of the existence of the tumors at the base of the brain of the plaintiff, but only of their effect in producing the symptoms of disease which appeared in the plaintiff's case. A doctor of medicine may be competent to express an opinion upon the effect of pressure at the base of the brain, whether it arises from tumors or other causes, although he may never have been called to a case where tumors were known to exist there; and in determining the qualifications of a physician, the extent of his reading in his profession may be considered, as well as his experience. See *Finnegan v. Fall River Gas Works*, 159 Mass. 311.

Exceptions overruled.

MILLARD F. FIELD vs. FRANK E. ALDRICH.

Suffolk. November 16, 19, 1894. — January 3, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Accord and Satisfaction — Construction of Contract.

A. invented and patented a machine, and B., according to an agreement with A., expended a certain sum in its development; and, upon an accounting together, B. owed A. a further sum. They executed a written agreement, which provided that a corporation should be formed, one fourth of the capital stock of which should belong to parties to whom A. had already assigned, one fourth each to A. and B., and the remaining fourth to A. as trustee, to be disposed of in the following manner: "The said A. agrees to dispose of the fourth interest held by him as trustee to the best advantage possible, and apply the proceeds thereof as follows:" first, to repay B.'s debt to him; secondly, to pay his own salary at a certain rate for a certain time; and thirdly, "any surplus of proceeds of sale of said trustee shares, after meeting the above claims, or any shares then

unsold, shall be divided equally between" A. and B. The corporation was formed immediately, and the shares of stock issued. A. tried to sell the shares held by him in trust under the agreement, but did not succeed, although other shares were sold by a third person. *Held*, in an action by A. against B. to recover the balance due him when the agreement was executed, that the taking by A. of the agreement with the shares of stock which were issued to him as trustee was not intended by the parties to be of itself a satisfaction of A.'s claim against B.; and that the action could be maintained.

CONTRACT, upon an account annexed, to recover the balance of an account. Answer, an accord and satisfaction. Trial in the Superior Court, before *Dunbar*, J., who reported the case for the determination of this court, in substance as follows.

The parties entered into an agreement several years before 1889, by which the defendant was to pay the expenses of the development of a vertical loom, of which the plaintiff was the inventor and patentee. The defendant, before 1889, paid to the plaintiff upwards of \$3,000 to defray those expenses; and on January 25, 1889, when certain agreements, copies of which were annexed to the defendant's answer and marked A and B, were executed, the defendant was indebted to the plaintiff on an accounting together in the further sums of \$911.50 and \$162.37.

Agreement A was entered into between the plaintiff, the defendant, and one Henry A. Williams, and provided that, whenever the loom and its patents should become the property of a corporation about to be formed for perfecting the loom and promoting its sale, the plaintiff and the defendant would severally cause the shares to which they were entitled to be issued to Williams as trustee, who should hold the same "for their joint benefit, in equal shares," subject to certain conditions recited.

Agreement B, which was entered into between the plaintiff and the defendant, provided as follows:

"First. A corporation shall be formed with a capital stock of such amount as shall be mutually agreed upon. Of this capital stock, one fourth shall belong to the parties to whom Field has already assigned; one fourth each to said Field and said Aldrich; and the remaining fourth to the said Field as trustee, to be disposed of as hereinafter mentioned. . . .

"Third. The said Field agrees to dispose of the fourth interest held by him as trustee to the best advantage possible, and apply the proceeds thereof as follows": 1. To repay to himself

\$911.50, being the defendant's share of expenses incurred to develop the loom from December 1, 1887, to December 1, 1888.

2. To repay to himself \$162.37, being advances made by the plaintiff for account of the defendant prior to December 1, 1887.

3. To pay his own salary at a certain rate for a certain time.

"Fourth. Any surplus of proceeds of sale of said trustee shares, after meeting the above claims, or any shares then unsold, shall be divided equally between said Field and said Aldrich."

Immediately after the execution of agreements A and B, a corporation was formed under the laws of the State of Maine, with two thousand shares of capital stock, the patent being the principal assets of the corporation. The plaintiff testified that, while he considered the loom of great value, it had not proved a success, as the mills in which it had been placed were not so constructed as to demonstrate its merits, but that in his judgment it would prove a success and a great saving in time over the present looms in mills so erected as to facilitate its operation as a vertical apparatus; that such mills could be easily erected, and he had not disposed of any of the shares in the fourth interest held by him as trustee under the third article of agreement B; and that he had tried to sell them and did not succeed. The plaintiff further testified, on cross-examination, that he was aware that, not long after the corporation was formed, one hundred shares of the defendant's stock held in trust according to the provisions of agreement A were sold for the sum of \$2,000, and the money received therefor. He also testified that, immediately after the execution of agreements A and B, he made a demand on the defendant for the sums declared on of \$911.50 and \$162.37; and, further, that the patent had a number of years to run. The credibility of his testimony was not questioned.

The defendant offered no evidence; and, at the close of the plaintiff's testimony, asked the judge to direct a verdict in his favor. The judge declined so to do; and directed the jury to return a verdict for the plaintiff for the sums above named, with interest thereon from January 25, 1889.

If the ruling was correct, judgment was to be entered for the plaintiff; otherwise, for the defendant.

G. F. Tucker, for the defendant.

B. C. Moulton, for the plaintiff.

ALLEN, J. If the correctness of the defendant's general proposition be assumed, — namely, that where a promise or agreement itself, and not its performance, is accepted in satisfaction and extinction of a demand, it is good as an accord and satisfaction without performance, — the question remains whether the taking by the plaintiff of the agreement B with the shares of stock which were issued to him as trustee was intended by the parties to be of itself a satisfaction of the plaintiff's claim against the defendant. By the terms of the agreement, the distribution of the capital stock was to be as follows: "One fourth shall belong to the parties to whom Field has already assigned; one fourth each to said Field and said Aldrich; and the remaining fourth to the said Field as trustee, to be disposed of as hereinafter mentioned." The provision as to the disposition of the remaining fourth was as follows: "The said Field agrees to dispose of the fourth interest held by him as trustee to the best advantage possible, and apply the proceeds thereof as follows," viz.: to repay the defendant's debt to him; to pay his own salary at a certain rate for a certain time; and "any surplus of proceeds of sale of said trustee shares, after meeting the above claims, or any shares then unsold, shall be divided equally between said Field and said Aldrich." In point of fact, according to the plaintiff's testimony, the credibility of which was not questioned, he never sold any of these shares; he tried to sell them and did not succeed, although one hundred other shares were sold by one Williams.

In our opinion, the plaintiff did not assume the risk of being able to sell these shares. If he should sell them, he was to apply the proceeds in the manner specified. But if he should be unable to sell them after due attempt, then his claim against the defendant would remain in force, and upon his enforcing it, the shares unsold would belong equally to the plaintiff and to the defendant.

Judgment for the plaintiff.

WARREN CHENEY vs. CHARLES W. CHENEY.

Middlesex. November 19, 1894. — January 8, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Evidence — Books of Account — Exceptions — Trial — Instructions.

Entries in a defendant's books of account are not made admissible by the fact that the plaintiff has been seen looking over the books with no more definite evidence that he has seen the entries.

No exception lies to the refusal of the judge to repeat instructions which he has given to the jury.

HOLMES, J. This is an action to recover for services at the rate of twelve dollars a week. The defendant alleged that the rate was six dollars a week, and claimed allowances for payments on account by a declaration in set-off. (See *Goldthwait v. Day*, 149 Mass. 185, 187.) The case was sent to an auditor, who found that the rate was twelve dollars, and disallowed three items in the defendant's declaration in set-off. The rest he allowed. At the trial in the Superior Court, the defendant offered his books of account in evidence for the purpose of showing by the correspondence of amounts with what naturally would have been paid under an agreement for six dollars that that was the agreement, and, we presume, of proving the three items disallowed by the auditor. The books were excluded, and the defendant excepted. It does not appear that the defendant did or could swear to the correctness of the charge, and the persons who made the entries testified that they were made by the defendant's direction in the absence of the plaintiff. The clerk who made the earlier entries testified that alterations and erasures had been made since the books left his custody. The judge inspected the books. The items disallowed seem all to relate to money alleged to have been paid to third persons. (No. 60, "To pd. Mrs. Grover bill of Nov. 23, 1883, \$58.92." No. 61, "To pd. Mrs. Grover bill, \$66.50." No. 137, "To club bill, \$6.") The defendant does not contend that the books were admissible as his books of account. *Prince v. Smith*, 4 Mass. 455, 459. *Maine v. Harper*, 4 Allen, 115, 116.

The ground on which the defendant contends that the books should have been let in is that there was some evidence of an admission by the plaintiff of their correctness. There was testimony that the plaintiff had access to the books and had been seen looking over them. As this was denied by the plaintiff, it might have been inferred, perhaps, if the testimony was believed, that the plaintiff did not protest against anything which he saw, and if he saw the disputed items and did not protest, the fact might be evidence for the defendant. *Commonwealth v. Funai*, 146 Mass. 570. *Sturtevant v. Wallack*, 141 Mass. 119, 123. But the books were not the plaintiff's books, or kept in his behalf. He was not a partner and had no interest in them, so that there was no ground for a presumption from the fact of access that he knew their contents. On the evidence above stated, it would be a mere guess whether he had seen the items in question.

The judge already had instructed the jury that the burden of proof was on the plaintiff, and properly had left it to the jury to say what weight should be attributed to the auditor's report. He was not called on to grant the request to repeat his instructions. If the request meant more than that it was wrong.* *Clement v. British American Assurance Co.* 141 Mass. 298, 304.

Exceptions overruled.

F. Lawton, for the defendant.

G. F. Richardson, for the plaintiff.

* At the close of the instructions, the defendant requested the judge to instruct the jury "that there is nothing in the auditor's report in this case which can aid the jury as to whether the price was six dollars or twelve dollars per week; and that, after the auditor's conclusion in this respect has been assailed by competent testimony, the burden of proof is still on the plaintiff when controverted by competent testimony."

THEODORE BOWEN & others vs. HARVEY E. PHINNEY.

Middlesex. November 20, 1894. — January 3, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Mechanic's Lien — Breach of Contract by Contractor — Defence.

It is no defence to a petition to enforce a mechanic's lien, under Pub. Sts. c. 191, for labor performed for a contractor upon the respondent's house, that the material furnished by the contractor was not of the quality called for by the contract and the petitioner's work, through no fault of his, was a damage to the house.

PETITION, to enforce a mechanic's lien, under Pub. Sts. c. 191. At the trial in the Superior Court, before *Blodgett, J.*, without a jury, it appeared that the respondent made a contract with one Bierweiller to paint a house, the same to be done with the best of stock, and to be first class in every respect, for the sum of \$150; and that the petitioners were workmen employed by the contractor in doing the painting.

The respondent offered to prove that, by reason of the poor stock used by the contractor, the painting was of no benefit to the respondent, but, on the contrary, a damage; and asked the judge to rule that the petitioners could not therefore maintain their petition, although they were not themselves in fault, and had valid claims against the contractor for their labor.

The judge refused to rule as requested; ruled that the evidence offered would not constitute a defence to the petitioners' lien; and found for the petitioners. The respondent alleged exceptions.

F. S. Hessel tine, for the respondent.

J. L. Powers, for the petitioners.

HOLMES, J. Our statute gives an immediate lien to one who has performed labor in the repair of a building by the consent of its owner. Pub. Sts. c. 191, § 1. Even if he is employed by a contractor, the laborer's lien is not by way of subrogation, and does not depend upon the terms of the contract or the state of the account between his employer and the owner of the land. See *Parker v. Bell*, 7 Gray, 429. *Atwood v. Williams*, 40 Maine,

409. *Laird v. Moonan*, 32 Minn. 358, 361. *Shenandoah Valley Railroad v. Miller*, 80 Va. 821, 831. *Mallory v. La Crosse Abattoir Co.* 80 Wis. 170. *Wright v. Pohls*, 83 Wis. 560, 563. 2 Jones, Liens, (2d ed.) § 1304. There are statutes of a different type in other States, but the books cited are enough to show that ours is a familiar form of legislation. The provision in § 2 has nothing to do with the case. By that section, when the agreement is for labor and materials, a lien is allowed for the labor for a sum not greater than the price for the entire contract. The contract referred to there, as also in *Moore v. Erickson*, 158 Mass. 71, 73, is the contract of the party claiming the lien, not a superior contract, and the purpose of the section merely is to save a lien for labor when the party has none for materials. We have no statute limiting the liability of the owner to the price stipulated in the contract with him, as in *Wright v. Pohls*, 83 Wis. 560, *Morehouse v. Moulding*, 74 Ill. 322, and the like. It follows that the facts offered to be proved would not be a defence. *Exceptions overruled.*

WILLIAM MOORE vs. LOUIS T. CUSHING & another.

Norfolk. November 21, 1894. — January 3, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON & BARKER, JJ.

Liability of successive Indorsers of a Note for the Accommodation of a Third Person.

Successive indorsers of a note for the accommodation of a third person are liable in the same order as indorsers for value, in the absence of special agreement.

CONTRACT, against Louis T. Cushing and Harvey H. Pratt, upon the following promissory note:

"\$500.

24 July, 1893.

"Three months after date, I promise to pay to the order of William Moore Five Hundred Dollars. Payable at any bank in Boston. Value received. Harvey H. Pratt."

Indorsed, "Louis T. Cushing, William Moore."

The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court, on appeal, on agreed facts, in substance as follows.

Before the delivery of the note, Pratt requested the plaintiff to get it discounted, and the plaintiff refused unless there was a satisfactory indorser. Thereupon the plaintiff accompanied Pratt to the office of Cushing, whom the plaintiff told that he was going to have the note discounted for Pratt provided Pratt obtained a satisfactory indorser. The plaintiff asked Cushing if he was good for the amount, and Cushing said that he was, and that the note would be paid when due; and that he was willing to indorse the note for the accommodation of Pratt, so that the note might be discounted for his benefit. The note was then indorsed by Cushing at the request of Pratt, and was delivered to the plaintiff, who thereafter himself indorsed it and had it discounted, and the proceeds were used for the benefit of Pratt. The plaintiff was obliged to pay the note, and Cushing alone defended, Pratt having been defaulted.

J. W. Keith, for the defendant Cushing.

J. J. Feely, for the plaintiff.

HOLMES, J. This is a suit upon a note between two persons, who both became parties on it for the accommodation of the maker. The defendant Cushing indorsed the note before delivery; the plaintiff is the payee, and indorsed after the defendant. If the plaintiff had not known that the defendant indorsed the note for accommodation, he would have been entitled to recover. *Woods v. Woods*, 127 Mass. 141. Knowledge of that fact under the circumstances stated does not affect his rights. In the absence of agreement, successive indorsers for the accommodation of a third person are liable in the same order as indorsers for value. *Shaw v. Knox*, 98 Mass. 214. Dan. Neg. Instr. (3d ed.) § 703. The conversation which took place between the parties, so far from expressing a different agreement, gave notice to the defendant that the plaintiff required his indorsement as the condition of becoming a party. It fortifies the presumption arising from the face of the paper. The suggestion on behalf of the defendant, that he signed also for the accommodation of the plaintiff, perverts, if it does not contradict, the agreed facts. It was urged that the plaintiff took the

note when overdue. But his rights and liabilities were fixed at the time of his indorsement. If the argument was sound, the judgment ought to have been for the defendant indorser in *Woods v. Woods*. *Judgment affirmed.*

COMMONWEALTH vs. EVELYN A. JOHNSON.

Suffolk. November 26, 1894. — January 3, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ

Care of Infants — Notice under Statute.

The language of St. 1892, c. 318, § 7, which requires any person receiving under his care or control, or placing under the care or control of another, for compensation, an infant under two years of age, to give notice within two days to the State Board of Lunacy and Charity, includes any person receiving an infant and any person placing an infant under the care of another, and relates to the reception of one infant, and has no reference to other provisions of the statute which require a license; and if a mother places her child under the care and control of a person who receives the child and agrees to board, care for, and take control of him, and then receives compensation for his board for the period of ten days, that person violates the statute if he does not give notice to said board within the two days.

COMPLAINT, under St. 1892, c. 318, § 7. At the trial in the Superior Court, before *Braley, J.*, the jury returned a verdict of guilty; and the defendant alleged exceptions. The facts appear in the opinion.

E. B. Powers, for the defendant.

M. J. Sughrue, Second Assistant District Attorney, for the Commonwealth.

FIELD, C. J. It does not appear that the defendant maintained a boarding-house for infants within the meaning of St. 1892, c. 318, §§ 1 and 2.

One contention on the part of the defendant is that the words "any person," etc., at the beginning of § 7 of this statute, must be construed to mean any person who maintains a boarding-house for infants within the meaning of §§ 1 and 2. An examination of the statute convinces us that this is not the meaning. The statute, by § 1, provides that no person shall maintain a board-

ing-house for infants without a license, and prescribes the punishment for maintaining such a boarding-house without a license. Section 2 defines what constitutes maintaining a boarding-house for infants within the meaning of § 1. To maintain such a boarding-house a person must have in his custody and control at one time more than one infant under the age of two years, etc. Sections 3 to 6 inclusive relate to licenses and licensees. Section 7 begins as follows: "Any person receiving under his care or control, or placing under the care or control of another for compensation, an infant under two years of age," etc.; and it requires such person to give notice to the State Board of Lunacy and Charity within two days of "such reception" of the infant, stating the fact that the infant has been received, and the names, ages, and residences of the infant and of its parents, etc. This language is general, and it includes any person receiving an infant, and any person placing an infant under the care and control of another, and it relates to the reception of one infant, and has no reference to the provisions of the statute requiring a license.

The other contention is that the infant must have been retained by the defendant at least two days before it became her duty to give notice, and that, as the infant was retained only one hour in the custody of the defendant, she did not violate the provisions of the statute by neglecting to give notice. See § 9. The argument is that it could not have been the intention of the Legislature that a notice should be required of any person taking the care or control for hire of an infant under two years of age for a few minutes or hours at the request of its parents or guardian, as this must often occur among people who work, without any intention of giving up the right of control over the infant. It is unnecessary, however, to express any opinion upon such a case. In the case at bar the exceptions recite that one Kate Donovan placed her child under the care and control of the defendant, "who received said child, and agreed to board and care and take control of said child, and then received compensation for its board for the period of ten days." It thus appears that the defendant was in no sense the servant of the mother of the child, and an arrangement had been made for the care and control of the child for at least ten days.

If the child had remained with the defendant more than two days, there would seem to be no doubt that the case was within the statute. We find nothing in the statute which makes a continuance of the care or control of the child for two days a condition on which the duty to give notice depends, and there are reasons why the Legislature might think it best to require the notice without regard to the length of time the child was actually in the control of the person receiving it. A child might die within the two days, and the cause of its death might need to be inquired into. In the case at bar, the defendant delivered the child, within one hour after she received it, to a woman who apparently was a stranger to her, on the statement of the woman that she came from the mother of the child and had authority to take the child. We infer that the mother never received the child. Such a disposition of the child might reasonably be made the subject of inquiry, and for that purpose notice that the child had been received might reasonably be required by the Legislature. If, as the exceptions recite, the defendant acted honestly in delivering up the child, it may be that she ought not to be punished or punished severely; but we are of opinion, on the facts stated, that she violated the statute in not giving notice within the two days.

Exceptions overruled.

JOHN F. O'BRIEN vs. JOHN G. THOROGOOD & others.

SAME vs. SAME.

SAME vs. JAMES M. W. HALL & others.

Middlesex. December 5, 6, 1894. — January 3, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

City — Validity of Ordinance — Cambridge Water Board — "Officers of the City" — Statute.

The St. 1865, c. 153, entitled "An Act for supplying the city of Cambridge with pure water," provided in § 6 as follows: "All the rights, powers, and authority given to the city of Cambridge by this act shall be exercised by said city, subject to all duties, liabilities, and restrictions herein contained, in such manner

and by such agents, officers, and servants as the city council shall from time to time ordain, direct, and appoint." In subsequent acts relating to the water supply, the language is substantially the same. None of these statutes constituted a water board, nor expressly provided that the city council should directly appoint the persons who were to exercise the powers conferred; but ordinances were passed in various years designating the manner of appointing the "agents, officers, and servants," and using the phrase "water board." The St. 1891, c. 364, entitled "An Act to amend the charter of the city of Cambridge," provided in § 9 as follows: "All officers of the city not elected by the qualified voters . . . shall, except as herein otherwise provided, be appointed by the mayor, subject to confirmation by the board of aldermen, and for such terms respectively as are or may be fixed by law or ordinance"; and in § 38 recognized the existence of the water board, and provided that its members should "continue to have and exercise all powers and be subject to all duties now conferred or imposed upon them by law or ordinance until the same shall be modified or repealed." Before 1892 the ordinances provided that the members of this board should be elected by the city council. In 1892, the city council passed the following ordinance: "The water works department shall be under the charge of the Cambridge water board, which shall consist of five persons, to be appointed by the mayor subject to the confirmation of the board of aldermen." *Held*, that the members of the water board were "officers of the city," within the meaning of the statute; and that this ordinance was valid.

THE first case was a petition for a writ of prohibition against the board of aldermen of Cambridge. The second case was a bill in equity against the same board. The third case was a petition for a writ of mandamus against the water board of Cambridge. The cases were heard, the first two together, and the third subsequently, and dismissed, by *Holmes, J.*, who, at the petitioner's request, reported all the cases for the determination of the full court. The facts appear in the opinion.

F. Hunt, for the petitioner.

G. A. A. Pevey, for the respondents.

LATHROP, J. On June 11, 1889, the petitioner was elected by the city council of the city of Cambridge a member of the water board of that city for the term of five years, and until his successor should be duly elected. On July 2, 1894, the mayor appointed one Allen as the successor of the petitioner on the water board, and the appointment was sent to the board of aldermen for confirmation. The petitioner on July 9 filed a petition in this court for a writ of prohibition against the board of aldermen of Cambridge. On the same day he also filed a bill in equity, praying for an injunction against the same persons, to prevent them from acting on the confirmation of Allen. These cases were heard by a single justice of this court, and were

dismissed on July 21. On July 24 the board of aldermen confirmed the nomination of Allen. The petitioner thereupon brought a petition for a writ of mandamus. This petition was heard by a single justice, and was dismissed. The three cases are now reported for our determination.

We have no occasion to consider whether either a writ of prohibition or a bill in equity is a proper remedy to afford the petitioner the relief sought, as it is conceded that, if the petitioner is entitled to relief, a writ of mandamus is an appropriate remedy.

The question in the case is whether Allen was legally appointed. It is admitted that he was so appointed, if an ordinance passed by the city council, and known as c. 26, § 1, of the Revised Ordinances of 1892, is valid. So much of this ordinance as is material to the case is as follows: "The water works department shall be under the charge of the Cambridge water board, which shall consist of five persons, to be appointed by the mayor, subject to the confirmation of the board of aldermen." The petitioner contends that the city council had no legal right to delegate by ordinance the appointment and confirmation of members of the water board to the mayor and aldermen.

The St. of 1865, c. 153, entitled "An Act for supplying the city of Cambridge with pure water," provides in § 6 as follows: "All the rights, powers, and authority given to the city of Cambridge by this act shall be exercised by said city, subject to all duties, liabilities, and restrictions herein contained, in such manner and by such agents, officers, and servants as the city council shall from time to time ordain, direct, and appoint." In subsequent acts relating to the water supply the language is substantially the same. Sts. 1875, c. 165, § 6; 1884, c. 256, § 10; 1888, c. 137, § 7; 1892, c. 421, § 8; 1894, c. 520, § 6.

Neither the St. of 1865, c. 153, nor any of the subsequent acts, constitutes a water board, or expressly provides that the city council shall directly appoint the persons who are to exercise the powers conferred. All of the acts contemplate that the manner of exercising the powers conferred, and the persons who shall act as the agents, officers, and servants of the city, shall be determined, as the city council may see fit, by ordinances passed from time to time.

Such ordinances were accordingly passed in 1865, 1867, 1871, 1880, 1889, and 1892. These ordinances designate the manner of appointing the "agents, officers, and servants," and use the phrase "water board." Before 1892 the ordinances provided that the members of this board should be elected, with the exception of certain persons who were *ex officio* members of the board, by the city council. And in 1892 the ordinance was passed which provided that the members of the Cambridge water board should be appointed by the mayor, subject to the confirmation of the board of aldermen.

This change was undoubtedly made in consequence of the passage of the St. of 1891, c. 364, entitled, "An Act to amend the charter of the city of Cambridge." Section 38 recognizes the existence of the Cambridge water board and the commissioners of the Cambridge cemetery, and provides that they "shall continue to have and exercise all powers and be subject to all duties now conferred or imposed upon them by law or ordinance until the same shall be modified or repealed." This section, however, makes no mention of the manner in which the members of the water board shall be appointed, nor is the Cambridge water board otherwise mentioned by name.

No other provision for the appointment of members of this board is made in the amended charter, unless they are included in § 9, which provides, "All officers of the city not elected by the qualified voters . . . shall, except as herein otherwise provided, be appointed by the mayor, subject to confirmation by the board of aldermen, and for such terms respectively as are or may be fixed by law or ordinance." We have no doubt that the members of the water board are officers of the city within the meaning of that term in this section, and that it was competent for the city council to pass the ordinance under which Allen was appointed and confirmed as the successor of the petitioner.

The result is that the petition for a writ of prohibition, the bill in equity, and the petition for a writ of mandamus must be dismissed.

So ordered.

INDEX.

ACCIDENT INSURANCE.

See BURDEN OF PROOF, 2, 3; MASTER AND SERVANT, 7; NEGLIGENCE, 8.

ACCOMPLICE.

See WITNESS, 1.

ACCORD AND SATISFACTION.

A. invented and patented a machine, and B., according to an agreement with A., expended a certain sum in its development; and, upon an accounting together, B. owed A. a further sum. They executed a written agreement, which provided that a corporation should be formed, one fourth of the capital stock of which should belong to parties to whom A. had already assigned, one fourth each to A. and B., and the remaining fourth to A. as trustee, to be disposed of in the following manner: "The said A. agrees to dispose of the fourth interest held by him as trustee to the best advantage possible, and apply the proceeds thereof as follows:" first, to repay B.'s debt to him; secondly, to pay his own salary at a certain rate for a certain time; and thirdly, "any surplus of proceeds of sale of said trustee shares, after meeting the above claims, or any shares then unsold, shall be divided equally between" A. and B. The corporation was formed immediately, and the shares of stock issued. A. tried to sell the shares held by him in trust under the agreement, but did not succeed, although other shares were sold by a third person. *Held*, in an action by A. against B. to recover the balance due him when the agreement was executed, that the taking by A. of the agreement with the shares of stock which were issued to him as trustee was not intended by the parties to be of itself a satisfaction of A.'s claim against B.; and that the action could be maintained. *Field v. Aldrich*, 587.

ACCOUNT.

See EVIDENCE, 14-20; EXECUTOR, 2; PARENT AND CHILD, 2, 3.

ACQUITTAL.

See INDICTMENT, 5.

ACTION.

1. An owner of land, who is not in possession and has no right of possession thereof, cannot maintain an action of trespass *quare clausum fregit*, but may maintain an action for an injury to the reversion. *Hersey v. Chapin*, 176.
2. The owner of a house in a city which, while in the possession of a tenant at will, is taken and used, without the owner's consent, by the board of health of the city as a hospital for parties sick with the small-pox, may maintain an action against the members of the board for the injury to his reversion, if it appears that such use of the house diminished its rentable value. *Ibid.*
3. An action cannot be maintained against the owner of a house let in tenements for personal injuries occasioned to a child of a tenant by reason of the defective condition of a platform attached to the rear of the house, and used in common by the tenants thereof, if the platform was in the same condition at the time of the accident in which it was when the tenement was hired by the plaintiff's father, who could have discovered its condition upon reasonable examination, and which condition was known to the plaintiff's mother, who had used the platform frequently. *Moynihan v. Allyn*, 270.
4. If a person's hose gets mixed with that of a town and the fire department uses it in connection with the town hose in extinguishing fires, supposing that it belongs to the town, an action against the town for the use of the hose will not lie, if no actual contract was made by the town and there were no circumstances from which a contract with the town might be inferred. *Dolloff v. Ayer*, 569.
5. A policy of insurance, not under seal, was issued to A. upon his life, in which the insurance company agreed to pay to the person or persons designated in the fifth condition of the policy, upon receipt of proofs satisfactory to the company of the death of the insured, a certain sum of money. The fifth condition was as follows: "The production by the company of this policy, and of a receipt for the sum assured, signed by any person furnishing proof satisfactory to the company that he or she is an executor or administrator, husband or wife, or relative by blood, or lawful beneficiary, of the insured, shall be conclusive evidence that such sum has been paid to and received by the person or persons lawfully entitled to the same, and that all claims and demands upon said company under this policy have been fully satisfied." B. was named as the beneficiary in the application for the insurance made by A. Held, that the administrator of A.'s estate could maintain an action on the policy. *McCarthy v. Metropolitan Life Ins. Co.* 254.
6. A certificate of shares of the preferred stock of a corporation, the issue of which was authorized by statute, provided as follows: "The holder of the

stock represented by this certificate is entitled to dividends thereon annually out of net profits, in preference and priority to the holders of any stock of said corporation except the preferred stock issued under said act, to the amount of six per cent, which rate per cent was determined by vote of said corporation prior to its original issue; and said holder is also entitled to share *pro rata* with the holders of the common stock in any excess divided in any year above a dividend on the whole stock of said company at said rate of six per cent. The holder of the stock represented by this certificate is entitled to dividends upon it at six per cent for each year from the time of its issue, cumulatively, before any dividends shall be paid upon any stock of said corporation except the preferred stock issued under said act, which dividends are guaranteed by said company, a vote of said company to that effect having been passed prior to its original issue." *Held*, that, no dividend having been declared by the corporation, a holder of such certificate could not maintain an action at law against the corporation for the amount of the dividends therein mentioned. *Field v. Lamson & Goodnow Manuf. Co.* 388.

See ACCORD AND SATISFACTION; ASSAULT, 2, 3; BENEFICIARY ASSOCIATION, 4; CONTRACT, 6, 9; CORPORATION, 4; DAMAGES, 4; EVIDENCE, 26; FENCE; FRAUDS, STATUTE OF, 1, 8, 10; INSURANCE; JUDGMENT; LEASE, 7; MALICIOUS PROSECUTION; MASTER AND SERVANT, 2; NEGLIGENCE, 1, 14, 16-22; PARENT AND CHILD, 2; TENDER.

ADMINISTRATOR.

See ACTION, 5; DEED, 6; ESTATES OF PERSONS DECEASED; EXECUTOR, 8.

ADMISSIONS.

See EVIDENCE, 21-23; NEGLIGENCE, 8; TRIAL, 8.

ADULTERY.

If, at the trial of an indictment for adultery, the defendant having obtained a divorce in another jurisdiction and married again, the evidence with its legitimate inferences may well satisfy the reason and judgment of the jury, and convince them to a reasonable and moral certainty that the defendant's domicile remained in this Commonwealth, and that his purpose in going into another State was to get a divorce and not to change his home, a request for a ruling that the jury were not justified, upon the evidence, in finding him guilty, as it failed to show beyond a reasonable doubt that he was an inhabitant of this Commonwealth when the divorce was granted, is rightly refused. *Commonwealth v. Kendall*, 221.

See EVIDENCE, 40; LIMITATIONS, STATUTE OF, 1, 2.

ADVERSE POSSESSION.

See BOUNDARY, 3; EASEMENT, 1, 3, 4.

AFFIDAVIT.

See NEW TRIAL, 3-5; POOR DEBTOR, 8, 11, 12.

AGENT.

See PRINCIPAL AND AGENT.

AGREED FACTS.

See SUPREME JUDICIAL COURT, 5.

AMENDMENT.

See NEW TRIAL, 4; PARTNERSHIP, 3.

ANNUITY.

See TAX, 1, 2.

ANSWER.

See ASSAULT, 1; TRUSTEE PROCESS, 3, 4.

APPEAL.

1. The question of the authority of the assistant clerks of the Municipal Court of the city of Boston to issue executions, and to sign orders and certificates made by that court, cannot be raised for the first time at the argument in this court of an appeal from an order of the Superior Court overruling a motion in arrest of judgment upon a conviction there of a charge of fraud filed in poor debtor proceedings in which that question has not been included. *Noyes v. Manning*, 14.
 2. An appeal from an order of the Superior Court overruling a motion in arrest of judgment brings up as matter of law only the question of the correctness of the ruling as made upon the motion that was filed. *Ibid*.
- See EQUITY, 4; PARTITION, 2; POOR DEBTOR, 5; SUPREME JUDICIAL COURT, 4, 6-8; TRUSTEE PROCESS, 2, 3.

APPEARANCE.

See EXCEPTIONS, 13.

APPORTIONMENT.

See INSURANCE, 3.

APPRAISAL.

See CORPORATION, 3.

ARREST.

See POOR DEBTOR, 1, 11, 12.

ASSAULT.

1. Justification for an assault cannot be shown as a defence under a general denial, but must be pleaded specially. *Lambert v. Robinson*, 34.
2. A person who has a right to enter upon the land of another may use such force as is required for the purpose without being liable to an action, but if he commits a breach of the peace he is liable to the Commonwealth, and if he uses excessive force he is liable to a personal action for an assault. *Ibid.*
3. In an action of trespass for breaking and entering the plaintiff's close and for an assault, it appeared that the plaintiff had hired certain furniture of the defendant under a written lease which gave the defendant a license to enter and remove the furniture upon the plaintiff's failure to pay rent, and prohibited the plaintiff, so long as rent was payable, from removing the furniture from the premises described therein; that because of the removal of the furniture by the plaintiff during the continuance of the lease, and because of his failure to settle the entire account on demand, the defendant's servants attempted to enter the plaintiff's house, and that, when one of them knocked at the outside door and it was opened by the plaintiff's daughter, they rushed into the house in a violent manner, throwing the plaintiff's daughter back on the stairs and frightening her; that afterwards one of them went to the rear of the house and opened a window, jumped into the house, and pushed the plaintiff's wife violently against the side of the house; that when the plaintiff came in they were sitting in the parlor; that when he asked them why they were there and what they wanted, and, opening the door, requested them to go out, they made no reply; that he then went to the kitchen and got a rolling-pin and returned into the room where they were, whereupon one of them seized him by the arm and another one wrested the rolling-pin from him and committed the assault. It did not clearly appear from the bill of exceptions that any rent was due at the time of the entry, but it was agreed that there was a balance still unpaid upon the contract. *Held*, that on this evidence it could not be said that there was no evidence of excessive force, and that the ruling requested by the defendant, that his entry was reasonable and proper, and that the plaintiff could not maintain the action, was rightly refused. *Ibid.*

See RAPE.

ASSIGNMENT.

An assignment of all claims for money due and to become due for "services" rendered under a contract for the erection of a house includes claims for money due for expenditures under the contract, as well as for labor performed thereunder. *Tracy v. Waters*, 562.

See DEED, 8; INSOLVENT DEBTOR; MORTGAGE.

ATTACHMENT.

See INSOLVENT DEBTOR.

AUCTION.

See FRAUDS, STATUTE OF.

AUDITOR.

1. An objection to the report of an auditor, that the evidence upon which his conclusion is based was inadmissible, should be taken by a motion to recommit the report to the auditor, and cannot be taken for the first time at the trial as a ground for rejecting the whole report. *Collins v. Wickwire*, 148.
2. If the only evidence introduced at the trial of a case is an auditor's report, the judge, who hears the case without a jury, is not obliged to accept the conclusions of the auditor upon the facts stated in his report, but may consider all the facts in their relation to one another, and draw any proper inferences from them and reach any conclusion that they will warrant. *Livingston v. Hammond*, 375.

See CONTRACT, 7; GRADE CROSSING, 8.

BANK.

See EVIDENCE, 14-19; NATIONAL BANK; SAVINGS BANK.

BENEFICIARY ASSOCIATION.

1. Under the Pub. Sts. c. 115, § 8, (as amended by the St. of 1882, c. 195, § 2,) in force when a certificate was issued by a beneficiary association, a member could not designate one who was merely a creditor as a beneficiary; and legislation passed since the issuing of the certificate up to July 23, 1893, the date of the decease of the assured, has not so changed the status of the beneficiary as to entitle him to recover. *Clarke v. Schwarzenberg*, 98.
2. The fact that the designation of the beneficiary in a certificate issued by a beneficiary association was invalid, does not render the whole contract

void, and on the death of the assured his executor is entitled to the money in trust for the benefit of those who at the time the contract was made were entitled to be named as beneficiaries. *Clarke v. Schwarzenberg*, 98.

3. In an action by the receiver of a fraternal beneficiary association incorporated under St. 1888, c. 429, as amended by St. 1890, c. 341, to recover money alleged to have been wrongfully taken by the defendant from the funds of the corporation while a director thereof, there was evidence that the semiannual *per capita* taxes for payment of expenses were sent directly to the secretary general of the corporation, and did not go to the treasurer general; and it appeared that the defendant received his payments through the treasurer general. *Held*, that, while the evidence in regard to the fund from which the payments of the money which the plaintiff sought to recover were made was not direct and clear, the jury might fairly infer that it was the reserve fund. *Putnam v. Gunning*, 552.
4. At the trial of an action by the receiver of a fraternal beneficiary association incorporated under St. 1888, c. 429, as amended by St. 1890, c. 341, to recover \$1,500 alleged to have been wrongfully taken by the defendant from the funds of the corporation while a director thereof, there was evidence that he was an officer of the corporation for two years from its organization; that he was a director, and received his salary as such up to the time of the receivership; that on a certain day he made a contract with the corporation to continue for eighteen months from that date to promote the growth and well being of the corporation in certain States, in such form and manner as he should be directed from time to time by certain officers of the corporation, at an annual salary of \$1,500, to be paid him by the corporation; that on a certain day he received \$500 from the corporation before any part of this salary had become due, and at the time of the payment, when asked by the bookkeeper what it was for, replied that "he would tell him what it was for at some future time," and that he said "he was in a tight place and had got to use the money"; that about three weeks later he received \$500, which he receipted for on account of salary, and two months afterwards he received \$500 more; that there had previously been talk by the defendant, or by other officers of the corporation in his presence, as to the likelihood of the corporation being stopped very soon; and that a fund of \$10,000 had been set apart by the directors two or three months before for the purpose of perpetuating and defending the corporation. There was also evidence tending to show that the defendant did little or nothing under his contract; and that the payments, by direction of the principal officer, had been charged up to a certain publication as for services of the defendant as editor and publisher. The defendant afterwards told the bookkeeper that the entry on the books should be changed, as the money was paid to him not for the publication, but for lecturing for the corporation and promoting its interest. All this time his salary as director was paid to him separately, and he was preaching regularly on Sundays at a church in another State. The defendant did not testify, nor offer any explanation of these matters. *Held*, that the case was rightly submitted to the jury. *Ibid*.

See EVIDENCE, 23, 24.

BOARD OF HEALTH.

The board of health of a city cannot, without the consent of the owner, lawfully establish and use premises as a hospital for patients sick with the small-pox, except under a warrant issued in accordance with the provisions of Pub. Sta. c. 80, § 43. *Hersey v. Chapin*, 176.

See ACTION, 2; TENANT AT WILL.

BOND.

See ESTATES OF PERSONS DECEASED; SPECIFIC PERFORMANCE, 2, 4.

BOSTON.

See CITY, 1, 2.

BOUNDARY.

1. At the trial of a writ of entry, brought in 1893, the tenant traced his title back to a deed to B. dated in 1831, giving the northern boundary of the land conveyed as A.'s land, and providing that B., his heirs and assigns, were "to support all the fence around said land"; and the deed under which the demandant claimed described his land as beginning "at the southerly corner of B.'s land" on the road, and made B.'s land his northerly boundary. There was evidence tending to show that the fence between the respective lots of the parties, which were adjacent to each other on the same street, stood where a very ancient fence stood; and the judge, who heard the case without a jury, found that from 1854 to the time of the trial a fence had been maintained in the line of the present fence, and that during that period the several owners of the B. lot had "openly and continuously held possession under a claim of right, and adversely, of the land northerly of and up to the line of said fence, including the demanded premises." The tenant became the owner also of the land formerly owned by A.; and a survey showed that the measurements on the road and in the rear given in the deed to B., added to the measurements on the road and in the rear given in the deed of A.'s land referred to in the description of the B. lot, were together about six feet less than the actual measurements of the lines of these two lots as occupied by the tenant. The evidence tended to show that this land was formerly of little value, rough, uneven, covered in part with bushes and difficult of measurement. *Held*, that the judge properly found that the fence was the line of ownership between the parties; and that judgment was rightly ordered for the tenant. *Beckman v. Davidson*, 347.
2. If an ancient deed of land provides that the grantee is "to support all the fence around said land," and a fence is erected by agreement of the parties in occupation of that and the adjoining land at or about that time, as and for a monument contemplated by the deed, and is so erected without fraud or mistake, and afterwards acted upon by them, a slight variation from

mathematical accuracy in fixing its position will not affect its conclusiveness as a boundary. *Beckman v. Davidson*, 347.

3. If the grantee in a deed of land, providing that he is "to support all the fence around said land," and his successors in title for more than twenty years occupy continuously up to a fence which was on the land at the date of the deed, or was erected there about that time, as a boundary of the lot described in the deed, but which is found by a survey to have been placed six feet beyond the line of such land, the seisin of such grantee will pass by his conveyance of the land, even though the language of the description is the same as that in the deed to him; and a subsequent grantee is entitled to invoke the continuous possession of his predecessors in title to establish a title to the strip of six feet by disseisin and adverse possession. *Ibid.*

See DEED, 1, 2.

BREACH OF PROMISE OF MARRIAGE.

1. It is not the duty of a person, before making or accepting an offer of marriage, to communicate all the previous circumstances of his or her life; and the parties to the contract will be bound, if they become engaged to marry without making any investigation, and without receiving any assurances or representations which lead to the engagement, even though matters relating to either party are discovered subsequently which, if known at the time, would have prevented the engagement, unless they are such as give a right to the other party to terminate the contract upon their discovery. *Van Houten v. Morse*, 414.
2. If a man and a woman enter into an engagement to marry, the facts that she had some negro blood in her veins, or that her motives were mercenary, or that there was a want of affection on her part, or an incompatibility, resulting from disparity of age, difference in character and disposition, and other causes, will not justify him, as matter of law, in breaking the contract. *Ibid.*
3. If a woman, who contemplates entering into an engagement to marry, undertakes, without inquiry from the man, to state facts relating to any circumstances in her history or life, or to her parentage or family, or to her former or present position, which are material, she is bound not only to state truly the facts which she narrates, but also not to suppress or conceal any facts which are necessary to a correct understanding on his part of the facts which she states; and, if she wilfully conceals and suppresses such facts, and thereby leads him to believe that the matters to which such statements relate are different from what they actually are, she will be guilty of a fraudulent concealment, which will avoid a contract to marry subsequently made. *Ibid.*
4. At the trial of an action for breach of a promise of marriage, the defendant requested the judge to rule as follows: "If mutual promises to marry were made, and the defendant was influenced to do so by the fraud or deception of the plaintiff as to her life, lineage, character, traits of character, or property, or former condition in life, his promise does not bind

him." The judge said: "That I should give with the qualification which I have made generally upon the subject. I think there is nothing objectionable in that." He had previously told the jury that it was not the duty of a party, before making or accepting an offer of marriage, to communicate all the previous circumstances of his or her life; and that a party would not have the right to terminate a contract to marry on the ground of fraud upon subsequently discovering matters which, if seasonably known, might have prevented the engagement, though not sufficient to justify a party in breaking it off. *Held*, that, as thus qualified, the instruction was correct, and the defendant had no ground of exception. *Van Houten v. Morse*, 414.

See EVIDENCE, 4.

BROKER.

In order that a broker may recover of the owner of property a commission for effecting the sale of the same, the general rule of law is, that, if there was no direct communication between the broker and purchaser, it must be shown affirmatively that the latter was induced to enter into the negotiations which resulted in the purchase through the means employed by the broker for that purpose. A request by the broker for a ruling that, if the owner agreed to pay him a certain amount if he found the owner a customer or made a sale, then he was entitled to the promised commission, if the jury were satisfied that the purchaser obtained his knowledge that the property was for sale from persons with whom the broker negotiated for the sale, and, acting thereon, went to see the place and bought it of the owner, is rightly refused; and instructions to the effect that the jury are to determine whether the broker was the cause or instrumentality or the efficient or effective means of bringing the purchaser and seller together are correct. *Gleason v. Nelson*, 245.

See EVIDENCE, 36; PRINCIPAL AND AGENT, 2.

BUILDINGS.

See ACTION, 2, 3; CONTRACT, 1, 6-8; LEASE, 7; MECHANIC'S LIEN; TENANT AT WILL; TOWN.

BURDEN OF PROOF.

1. If, in an action for goods sold, the defendant relies on a breach of warranty of the quality of the goods, the burden of proof is on him to establish the warranty and the breach of it. *Noble v. Fagnant*, 275.
2. In an action upon a policy of insurance against "bodily injuries effected through external, violent, and accidental means, within the intent and meaning of the conditions" recited therein, one of which is that no claim shall be valid thereunder "when the death or injury may have happened in consequence . . . of any voluntary exposure to unnecessary danger," and

another of which is that "standing, riding, or being upon the platforms of moving railway coaches other than street cars, or riding in any other place not provided for the transportation of passengers, or entering or attempting to enter or leave any public conveyance using steam as motive power while the same is in motion, . . . are hazards not contemplated or covered by this certificate," the burden of proof is on the defendant, after the plaintiff has shown that the injuries were "effected through external, violent, and accidental means," to show that they resulted from some of the causes specified in the conditions as not within the insurance. *Anthony v. Mercantile Mutual Accident Association*, 354.

3. A policy of insurance was issued against "bodily injuries effected through external, violent, and accidental means," containing conditions that no claim should be valid thereunder "when the death or injury may have happened in consequence . . . of any voluntary exposure to unnecessary danger," and that "standing, riding, or being upon the platforms of moving railway coaches other than street cars, or riding in any other place not provided for the transportation of passengers, or entering or attempting to enter or leave any public conveyance using steam as motive power while the same is in motion, . . . are hazards not contemplated or covered by this certificate." In an action upon the policy, it appeared that the assured was a passenger on a train upon a certain railroad; that he was seen in his usual health in one of the cars of the train late in the evening, just before it reached a station at which trains were accustomed to stop; that he had a ticket for a station farther on, to which the train was going; that the train stopped at the first named station to take the mail; that the night was dark, and there was no light on the platform at the station; that the train started slowly, and, when it had gone not more than thirty or fifty feet, he was discovered on the ground between the platform and the nearest rail of the track, with his legs crushed by the wheels of one of the trucks which had passed over them; that he survived about four hours, being unconscious most of the time, and then died from the injury; and that no witness saw the accident, and nothing more was shown in regard to the cause of it. *Held*, that it could not be ruled, as matter of law, that the burden of showing that the injuries to the assured resulted from some of the causes specified in the conditions of the policy as not within the insurance, was sustained by the defendant, but that it was a question for the jury. *Ibid*.

See INSURANCE, 6; NEGLIGENCE, 11; NEW TRIAL, 1; SLANDER.

BY-LAW.

See CITY; COMPLAINT, 2; CONTRACT, 3; CORPORATION, 3, 4; TOWN.

CAMBRIDGE.

See CITY, 4.

CARRIER.

See NEGLIGENCE, 14, 15; PASSENGER.

CASE STATED.

See SUPREME JUDICIAL COURT, 5.

CERTIFICATE.

See CONTRACT, 3, 6-8.

CHARITY.

See TAX, 3.

CHILD.

See ACTION, 3; INFANT; PARENT AND CHILD.

CITY.

1. An ordinance of the city of Boston, providing that no person shall, except by permit from the mayor, "make any public address" in or upon any of the public grounds of the city, is constitutional, and the words "public address" apply to sermons delivered on the Common. *Commonwealth v. Davis*, 510.
2. An ordinance of the city of Boston which provides that "no person shall carry or cause to be carried on any vehicle in any street a load the weight whereof exceeds three tons, unless such load consists of an article which cannot be divided," is reasonable, constitutional, and valid, under Pub. Sts. c. 53, § 15; and an offer of proof which does not take the case out of the field of regulation by the Legislature, or by the mayor and aldermen as a local tribunal acting under the authority of the Legislature, is rightly refused. *Commonwealth v. Mulhall*, 496.
3. The following ordinance of the city of Springfield is reasonable: "No person shall stand with or permit any team under his care or control to stand across any public highway or street in such a manner as to obstruct the travel over the same, and no person shall stop with any team in any public street at the side of or so near to another team as to obstruct public travel, and no person shall stop with any team or carriage upon or across any crosswalk in any street or highway in the city." *Commonwealth v. Derby*, 183.
4. The St. 1865, c. 153, entitled "An Act for supplying the city of Cambridge with pure water," provided in § 6 as follows: "All the rights, powers, and authority given to the city of Cambridge by this act shall be

exercised by said city, subject to all duties, liabilities, and restrictions herein contained, in such manner and by such agents, officers, and servants as the city council shall from time to time ordain, direct, and appoint." In subsequent acts relating to the water supply, the language is substantially the same. None of these statutes constituted a water board, nor expressly provided that the city council should directly appoint the persons who were to exercise the powers conferred; but ordinances were passed in various years designating the manner of appointing the "agents, officers, and servants," and using the phrase "water board." The St. 1891, c. 364, entitled "An Act to amend the charter of the city of Cambridge," provided in § 9 as follows: "All officers of the city not elected by the qualified voters . . . shall, except as herein otherwise provided, be appointed by the mayor, subject to confirmation by the board of aldermen, and for such terms respectively as are or may be fixed by law or ordinance"; and in § 38 recognized the existence of the water board, and provided that its members should "continue to have and exercise all powers and be subject to all duties now conferred or imposed upon them by law or ordinance until the same shall be modified or repealed." Before 1892 the ordinances provided that the members of this board should be elected by the city council. In 1892, the city council passed the following ordinance: "The water works department shall be under the charge of the Cambridge water board, which shall consist of five persons, to be appointed by the mayor subject to the confirmation of the board of aldermen." *Held.* that the members of the water board were "officers of the city," within the meaning of the statute; and that this ordinance was valid. *O'Brien v. Thoroughgood*, 598.

See ACTION, 2; BOARD OF HEALTH; COMPLAINT, 2; EVIDENCE, 10;
NEGLIGENCE, 2, 3; TENANT AT WILL; TRIAL, 18, 19.

CLERK OF COURT.

See APPEAL, 1.

COERCION.

See PERJURY.

COLLATERAL LEGAGY AND SUCCESSION TAX.

See CONSTITUTIONAL LAW, 2; TAX.

COLLATERAL SECURITY.

See CONTRACT, 5; PARTNERSHIP, 1; TRANSFER OF STOCK, 1-3.

COMMISSIONERS.

See ESTATES OF PERSONS DECEASED; GRADE CROSSING, 3.

COMMISSIONS.

See BROKER; CONTRACT, 8; PRINCIPAL AND AGENT, 2.

COMPLAINT.

1. Under the Pub. Sts. c. 100, § 1, which enacts that "no person shall sell or expose or keep for sale, spirituous or intoxicating liquor, except as authorized in this chapter," the second and third counts in a complaint which merely allege that the defendant "did unlawfully sell intoxicating liquors to a man whose name is to your complainant unknown," are insufficient; and the words that follow the third count, that "the complainant further says that all of said sales were made by [the defendant] without any lawful right or authority," are intended to apply to all the counts, and not to the third count alone. *Commonwealth v. Crossley*, 515.
2. An ordinance of a city was as follows: "No person shall stand with or permit any team under his care or control to stand across any public highway or street in such a manner as to obstruct the travel over the same, and no person shall stop with any team in any public street at the side of or so near to another team as to obstruct public travel, and no person shall stop with any team or carriage upon or across any crosswalk in any street or highway in the city." *Held*, that a complaint for a violation of the last clause of the ordinance, which set out the offence in the language of the ordinance, with a description of the team and a designation of the walk by reference to the street on which it was, was sufficient, without alleging that public travel was obstructed or that the defendant intended to obstruct it. *Commonwealth v. Derby*, 188.

See CONVICTION; EXCEPTIONS, 11; INTOXICATING LIQUORS, 1-5;
MALICIOUS PROSECUTION; TRIAL, 8; VARIANCE, 8.

CONDITION.

See ACTION, 6; BURDEN OF PROOF, 2, 3; CONTRACT, 8, 7; CORPORATION,
3, 4; DEED, 7, 8; INSURANCE, 7.

CONFESSION.

See EVIDENCE, 25, 40.

CONFLICT OF LAWS.

See ADULTERY; EQUITY, 8; EVIDENCE, 26; FOREIGN JUDGMENT.

CONSIDERATION.

See CONTRACT, 2.

CONSPIRACY.

See NEW TRIAL, 3.

CONSTITUTIONAL LAW.

1. The provisions of Article XII. of the Declaration of Rights, which secure to the accused person the right to have his crime or offence "fully and plainly, substantially and formally, described to him," only require such particularity of allegation as may be of service to him in enabling him to understand the charge and to prepare his defence. *Commonwealth v. Robertson*, 90.
2. The St. of 1891, c. 425, entitled "An Act imposing a tax on collateral legacies and successions," is constitutional, as the privilege of transmitting and receiving by will or descent property on the death of the owner is a "commodity" within the meaning of this word in the Constitution of Massachusetts, c. 1, § 1, art. 4, and an excise may be laid upon it; and the objections that the tax is unequal because not imposed upon all estates and upon all heirs, devisees, legatees, and distributees, and is unreasonable on account of the exemption in the proviso of the first section, "that no estate shall be subject to the provisions of this act unless the value of the same, after the payment of all debts, shall exceed the sum of ten thousand dollars," are not well founded. LATHROP, J. dissenting. *Minot v. Windthrop*, 113.
3. The St. 1892, c. 171, entitled "An Act to require railroad companies to maintain crossings to give access to lands cut off by railroads," is constitutional, and applies where one conveys a part of his land to a railroad in such form as to deprive himself of access to the remainder. *New York & New England Railroad v. Railroad Commissioners*, 81.

See CITY, 1, 2.

CONTRACT.

I. *Making.*

1. The declaration alleged that the plaintiff conveyed to the defendant certain real estate, subject to mortgage, and that in consideration thereof the defendant agreed to pay off the mortgage and sell the real estate for the plaintiff's benefit, and pay over to him the proceeds less the amount paid on the mortgage, and, in case he could not sell the real estate, to pay the plaintiff the market value thereof; that the defendant did pay off the mortgage, but, though requested by the plaintiff, refused to sell the real estate for the plaintiff's benefit or to pay him therefor. The jury were instructed to return a verdict for the defendant if they found that any debt except the mortgage was to be deducted from the value of the premises, and they returned a verdict for the plaintiff. *Held*, that it was for the jury to say upon the evidence what the contract was, and that the statute of frauds was not a defence. *O'Grady v. O'Grady*, 290.

See ACTION, 4, 5; BREACH OF PROMISE OF MARRIAGE, 1, 4; PARENT AND CHILD, 1; TRIAL, 15.

II. Consideration.

2. The seal to a contract imports a consideration, and in an action thereon none need be proved. *Taft v. Church*, 527.

See EVIDENCE, 42.

III. Validity.

3. The fact that conditions printed upon a certificate for shares of stock in a corporation are contained in by-laws of the corporation which may be invalid as such, does not render void the agreement made in accepting the certificate by the person to whom it is issued, if the contract is in substance one which the corporation has power to make. *New England Trust Co. v. Abbott*, 148.
4. A corporation has the power to agree with a purchaser of shares of its stock that, at his death, the shares shall be appraised by the directors of the corporation and transferred to it at the appraised value, if the directors so elect, who, "whenever, in their judgment, it can be done with safety and advantage to the corporation," shall "sell the shares to such persons as shall appear to them, from their situation and character, most likely to promote confidence in the stability" of the corporation; and such an agreement is not contrary to public policy. *Ibid*.

See BENEFICIARY ASSOCIATION, 1; BREACH OF PROMISE OF MARRIAGE, 8; INSURANCE, 3, 5-7, 12; NATIONAL BANK; PARTNERSHIP, 1, 2; PRINCIPAL AND AGENT, 1; TRANSFER OF STOCK.

IV. Construction.

5. If A. agrees that, in consideration of B.'s advancing a certain sum of money to C. and accepting from C. his promissory note and shares of a certain corporation as collateral security therefor, if the note is not paid at maturity, A. will purchase of B. the shares at a stated price, this is an original promise by A., and not a mere guaranty. *Taft v. Church*, 527.
6. A. and B. executed a written contract, by the terms of which A. was to erect a house on B.'s land for a certain sum, which was to be paid in three instalments, the second payment to be made "when all is completed," and providing that "in each of the said cases the architect shall certify in writing that all the work upon the performance of which the payment is to become due has been done to his satisfaction"; and that no certificate "except the final certificate" should be conclusive evidence of the performance of the contract, either wholly or in part, against any claim of the owner. No certificate was given for the first payment, but the architect gave a certificate reciting that A. was entitled to a certain sum, "being the second payment on the contract." *Held*, that this certificate was not a final one, within the meaning of the contract. *Beharrell v. Quimby*, 571.
7. If a contract for the erection of a house provides that the consideration is to be paid in three instalments, that a certificate of the architect is to

precede each payment, and that no certificate except the final one is to be conclusive evidence of the performance of the contract, and an auditor, to whom an action on the contract brought before a final certificate has been furnished by the architect is referred, finds that such certificate was not fraudulently or capriciously withheld, although he reports some facts tending to show the contrary, but which are not conclusive, this court cannot say, as matter of law, upon a report of the case by a judge who found for the defendant, that a sufficient reason or excuse for failing to produce a final certificate from the architect was made out; nor are payments made before and upon the furnishing of a certificate by the architect that the contractor is entitled to the second payment, to be deemed, as matter of law, a waiver of a further certificate. *Beharrell v. Quimby*, 571.

8. A. and B. executed a written contract, by the terms of which A. was to erect a house on B.'s land for a certain sum, which was to be paid in three instalments, the second payment to be made "when all is completed," and the final payment thirty days after the completion of the work, "provided that in each of the said cases the architect shall certify in writing that all the work upon the performance of which the payment is to become due has been done to his satisfaction." The contract also recited that "no certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, against any claim of the owner"; and that the owner "hereby contracts to pay the same at the time, in the manner, and upon the conditions, above set forth." No certificate was given for the first payment, but the architect gave a certificate reciting that A. was entitled to a certain sum, "being the second payment on the contract." About a month before this certificate was given, C. signed an agreement, which, after reciting that "there is now due to" A. from B. "a sum of money under and by virtue of a certain written contract," covenanted that, for considerations stated, C. would pay to A. "all sums of money now due and to become due to him under said contract according to the tenor thereof." On the day this agreement was dated a first payment was made to A.; ten days later a further payment was made; and about twenty days after this a third payment was made, the architect's certificate above mentioned being furnished on that day. About a month later, no further certificate having been given, A. brought an action on C.'s agreement. The judge, who tried the case without a jury, found for the defendant, on the ground that the action was prematurely brought. *Held*, that this finding was warranted by the evidence. *Ibid*.

See ACCORD AND SATISFACTION; ASSIGNMENT; EVIDENCE, 34-36; GUARANTY; INSURANCE, 4, 8, 9; LEASE, 1, 2, 4, 6; PRINCIPAL AND AGENT, 2.

V. *Performance and Breach.*

9. A., having made a certain invention for which he had applied for letters patent, assigned the invention to B., taking from him an agreement in writing, by which B. agreed as follows: "1. To pay all expenses of said appli-

cations and of obtaining said letters patent of the United States. 2. To manage the business for the joint benefit of both; to advance all funds requisite, but to look to the business for repayment, but to hold full title for the benefit of both until A. shall join in a change of title, and to use all reasonable efforts to increase and supply the demand for the " invention; " that is, to do all things which a wise and energetic owner of said patents with ample financial ability ought to do. . . . 5. I agree and bind myself and my legal representatives as above, with and to A. and his legal representatives." There was a delay in the granting of the patents, one of them not being granted until about two years after the date of the agreement, and B. died within seven months after the last patent was granted. *Held*, that the obligation of B. under the agreement was discharged by his death; and that the executor of his will could not be compelled to convey the letters patent to a trustee. *Marvel v. Phillips*, 399.

10. An agreement, signed by the defendant, certified that he had sold to the plaintiff certain mortgage bonds, one of them being called the " W. bond," by which the defendant agreed to take back the same bonds on thirty days' notice, the plaintiff paying him a certain commission. In an action thereon, there was evidence that, in January, 1890, the plaintiff took to the defendant a letter which he had received from a loan company, stating that the mill on W.'s land had been burned, and that the insurance company refused to pay. The plaintiff testified that he delivered the " W. bond " to the defendant, and said to him: " I have brought this bond back to you, and I am glad it has so happened that I have a good backer that is able to pay for them and do as he agreed. This bond I bought of you to be paid in thirty days. I deliver it and shall expect you to pay it back according as agreed." The defendant denied that any demand was made upon him; and his testimony tended to show that he received the bond to collect for the plaintiff. The judge, who tried the case without a jury, refused to rule as requested by the defendant, that " the evidence being undisputed that at the time the plaintiff took to the defendant the letter of January 6, 1890, and the W. bond, no commission was tendered the defendant, and no demand made that the defendant should receive and pay for the said bond, no demand and tender, as contemplated by the contract, was made "; and found for the plaintiff. *Held*, that the ruling requested was rightly refused; and that the plaintiff's testimony was sufficient to authorize a finding that a demand was made. *Held, also*, that, a formal tender having been made to the defendant of the amount of his commission more than thirty days before the date of the writ, if any tender was necessary, the fact that it was not made in January, 1890, was immaterial. *Van Deusen v. Steele*, 268.

See ACTION, 6; BREACH OF PROMISE OF MARRIAGE, 2, 4; CONTRACT, 4-6; SPECIFIC PERFORMANCE.

VI. Rescission.

11. A person who accepts a certain sum in satisfaction of a claim for personal injuries, and executes a release therefor under such circumstances as

but for the acceptance of the money would entitle him to avoid the same, cannot thereafter, unless fraudulently induced to believe that the money received by him was payment for a part only of his cause of action, avoid the release and maintain an action without first tendering back the sum received. *Drohan v. Lake Shore & Michigan Southern Railway*, 435.

See INSURANCE, 1.

CONTRACTOR.

See MECHANIC'S LIEN, 1.

CONTRIBUTORY NEGLIGENCE.

See EVIDENCE, 27, 39; HIGHWAY, 3; INFANT, 1; LAW OF THE ROAD; MASTER AND SERVANT, 5, 6; NEGLIGENCE, 2-5, 7, 9, 10, 12, 14, 19, 21, 22.

CONVICTION.

The fact, at the trial of an indictment, that the defendant had been called upon by the presiding justice of the Municipal Court of Boston while a complaint was pending against him in that court upon the charges contained in the indictment, and during proceedings in that court against other defendants who were charged in another complaint with the offence described in the second count of the indictment, to tell the justice of the Municipal Court about the defendant's connection with the cases, and that thereupon the defendant testified in the case against the other persons so charged, does not entitle him to be discharged from the prosecution. *Commonwealth v. Burroughs*, 513.

See INDICTMENT, 5.

CORPORATION.

1. A corporation was authorized by statute to issue preferred stock, the holders of which "shall be entitled to all the privileges of other members of said corporation, including the right to vote upon such stock, in person or by proxy, at all corporate meetings." The statute also provided that "the provisions of law relative to special stock . . . shall not be held to apply in case of stock issued under this act." Held, that an owner of such preferred stock must be regarded as a stockholder, and not as a creditor of the corporation. *Field v. Lamson & Goodnow Manuf. Co.* 388.
2. A corporation, under statutory authority, issued preferred stock, the certificates of which provided that the holders thereof were entitled to dividends thereon annually out of net profits, in preference to the holders of any other stock of the corporation, to the amount of a certain rate per cent; that they were also entitled to share *pro rata* with the holders of the common stock in any excess divided in any year above a dividend on the whole stock of the corporation at the rate so fixed; and that they were entitled

further to dividends on the preferred stock at the same rate for each year from the time of its issue, cumulatively, before any dividends should be paid upon any other stock of the corporation, "which dividends are guaranteed" by the corporation. The capital of the corporation became seriously impaired, and its indebtedness amounted to a large sum, and was payable on demand or on short time. The assets, though appearing to be largely in excess of the indebtedness, would have suffered a very great shrinkage from the valuation put upon them if disposed of to pay debts or to close up the business. During a portion of the time only were there net profits sufficient to warrant the payment of dividends on the preferred stock at the rate named in the certificates. The directors of the corporation refused to declare dividends, in part because they believed that it would endanger the ability of the corporation to pay its debts, and in part because they did not deem it proper so to do on account of the impairment of the capital. *Held*, that the directors did not appear so plainly to have acted in disregard of the rights of the preferred stockholders as to justify the interference of a court of equity. *Field v. Lamson & Goodnow Manuf. Co.* 388.

3. Certificates for shares of stock in a corporation recited that they were subject to the conditions expressed in the by-laws of the corporation printed thereon, which provided that the executor or administrator of any deceased stockholder should cause his shares to be appraised by the directors, and should thereupon offer the same to them for the use of the corporation at such appraised value; that if the directors should not, within ten days after the shares were offered to them, take the same and pay the executor or administrator the appraised value, he might sell the shares to any person; and, by an amendment, that it should be the duty of such executor or administrator to offer the shares for appraisal and to be taken by the corporation, if it should so elect, whenever requested by a certain officer within a time limited. A certificate for shares was issued to A., who receipted for the same as follows: "Received the above certificate subject to the conditions and restrictions therein referred to, and to the by-laws of the company, to which I agree to conform." At a meeting of the directors of the corporation it was voted that the stock of A., who had died, be appraised at a certain sum per share and taken for the use of the corporation. *Held*, upon a bill in equity to compel the executor of A.'s will to transfer the shares to the corporation, that the appraisal was valid; and that it was not necessary that the defendant should offer the stock to the corporation for appraisal. *New England Trust Co. v. Abbott*, 148.
4. If the by-laws of a corporation, containing conditions subject to which the certificates for stock are issued, provide that at the death of a stockholder his shares shall be appraised by the directors of the corporation and transferred to it at the appraised value, if the directors so elect, who are to dispose of it in a certain manner, it is no objection to a bill in equity by the corporation against the executor of the will of a deceased stockholder, whose shares it has so appraised and voted to take for the use of the corporation, for specific performance of the agreement to convey the shares made in accepting the certificate, that the stock was undervalued, there

being no fraud in the appraisal, and evidence relating to the value of the stock is rightly excluded, and, no stock in the corporation ever having been sold in the market, but all shares which have been transferred having been transferred to the corporation and disposed of by the directors in the manner provided, an action at law for damages will not furnish an adequate remedy. *New England Trust Co. v. Abbott*, 148.

See ACTION, 6; BENEFICIARY ASSOCIATION; CONTRACT, 3, 4; EQUITY, 3; EVIDENCE, 23, 24; GUARANTY; NATIONAL BANK; PRINCIPAL AND AGENT, 1; PROMISSORY NOTE, 3, 4; TAX, 3; TRANSFER OF STOCK, 1, 3.

COSTS.

See SUPREME JUDICIAL COURT, 4.

COURTS.

See APPEAL; ESTATES OF PERSONS DECEASED; QUIETING TITLE; SUPREME JUDICIAL COURT.

COVENANT.

See DAMAGES, 4; DEED, 1, 3; LEASE, 2; SPECIFIC PERFORMANCE.

CREDITORS.

See BENEFICIARY ASSOCIATION, 1; CORPORATION, 1; ESTATES OF PERSONS DECEASED; INSOLVENT DEBTOR; POOR DEBTOR.

CRIMINAL LAW.

See ADULTERY; ASSAULT, 2; COMPLAINT; CONSTITUTIONAL LAW, 1; CONVICTION; CRUELTY TO ANIMALS; EVIDENCE, 3, 5, 22, 25, 38, 41; EXCEPTIONS, 11; FORGERY; INDICTMENT; INFANT, 2; INTOXICATING LIQUORS; NEW TRIAL, 2; OLEOMARGARINE; PERJURY; POOR DEBTOR, 2; RAPE; SUPREME JUDICIAL COURT, 1-3; TRIAL, 1-11; VARIANCE, 3; WITNESS, 1.

CRUELTY TO ANIMALS.

An averment in an indictment, after the statement of the formal parts and a period of time, that the defendant E. "was the person having the charge and custody of a certain animal, to wit, a horse, and it was then and during the whole time aforesaid the duty of the said E. to provide the said horse with proper shelter and protection from the weather; and that the said E. did then and during the whole time aforesaid there unnecessarily and cruelly fail to provide the said horse with proper shelter and protection from the weather," etc., clearly and sufficiently describes the offence in the

language of Pub. Sts. c. 207, § 52; and as the insertion of the words "and cruelly" adds an immaterial allegation, which is not a part of the description of anything necessary to be mentioned in the complaint, the allegation may be rejected as surplusage. *Commonwealth v. Edmonds*, 517.

DAM.

See EMINENT DOMAIN; EVIDENCE, 9.

DAMAGES.

1. If a breach of warranty of the quality of goods sold is established, the defendant is entitled, in an action for the price of the goods, to have deducted from the contract price the difference in value between what he bought and what he received; and, if the goods were bought for a particular purpose, and were warranted fit for that purpose, and the defendant, relying upon the warranty, applies them to that purpose and suffers damage by reason of their unfitness, he is entitled to recoup the damages so sustained. *Noble v. Fagnant*, 275.
2. In an action to recover damages for the sale of a stallion by means of the false representations of the defendant of the value of the stallion as a breeding horse, the plaintiff can recover, in addition to the difference in value, the expense of keeping the stallion a reasonable time to test him. *Peak v. Frost*, 298.
3. In an action to recover damages for the sale of a stallion by means of the false representations of the defendant of the value of the stallion as a breeding horse, allegations in the declaration that the plaintiff did expend large sums in the care and maintenance of the stallion until he could test him as a breeder, and did so attempt to test him, and did thereby incur liabilities and expend large sums, are sufficient to include the expense of keeping the stallion. *Ibid*.
4. At the trial of an action for damages caused by the destruction of buildings by fire communicated by the locomotive engines of the defendant railroad, the question was raised whether the plaintiff, who was a lessee of the land and buildings thereon, was entitled to recover the full value of the buildings burnt, or whether his damages were to be confined to the injury to his possession during the unexpired term of the lease, leaving to the lessor a right of action to recover for the injury to the reversion. By the provisions of the lease it was the duty of the lessee to keep the buildings insured to an amount sufficient to repair or replace them in case of destruction or damage by fire, and to rebuild them, if burnt, unless excused by the lessor. *Held*, that the lessee was entitled to recover full damages, as if he were the bailee of the buildings, as personal property, and that his obligation to rebuild the buildings and his right to remove them and erect other buildings gave him an interest in the buildings apart from his interest in the land sufficient to enable him to recover such damages. *Held also*, that the lessee could not be asked by the defendant if he had replaced

the buildings in compliance with the lease, if the lessor had waived the lessee's obligation to rebuild, and if the lessor had taken any of the insurance on the buildings, as the liability of the defendant was to be determined on the facts as they existed at the time of the fire. *Anthony v. New York, Providence, & Boston Railroad*, 60.

See CORPORATION, 4; EMINENT DOMAIN; EVIDENCE, 8, 9, 26, 29; FRAUDS, STATUTE OF; GRADE CROSSING, 2; HUSBAND AND WIFE.

DEATH.

See CONTRACT, 9; EVIDENCE, 3, 12, 18; INDICTMENT, 2-4; MASTER AND SERVANT, 2; NEGLIGENCE, 12, 21.

DECEIT.

1. The declaration in an action for deceit alleged, in substance, that the plaintiff was induced to exchange her property, consisting of a parcel of land with a dwelling-house thereon, for the defendant's farm and the personal property thereon, by the latter's representations as to the advantageous situation and fertility of the farm and the value of the buildings, cattle, implements, and products thereon, all of which were enumerated; that these representations were false, "all of which the defendant well knew"; that the plaintiff had known and dealt with the defendant for many years, and placed great confidence in him as a reliable business man; that the plaintiff told the defendant that she did not know where his farm was located, and he promised to take her there, but, upon being asked so to do on three different occasions, he offered certain excuses for his inability to perform his promise, and finally told her that, after the deeds were given, he would show her the farm; "that by such evasions and delays, and by telling her that she could trust him, and in the mean time must not speak to any one about the proposed purchase, because there were one or two persons who would insist on buying the farm if they knew it was for sale, the defendant fraudulently induced her to forbear examining the farm and personal property and making inquiries about them, as she otherwise would have done; and that, in pursuance of the same fraudulent intent to deceive and injure her, the defendant so pressed her to complete the change of property that the whole business was completed on the second day after it was suggested to her by the defendant, so that she had no time to examine or inquire about said property." *Held*, that the declaration, not having been demurred to, was sufficient to support a verdict for the plaintiff. *Brady v. Finn*, 260.
2. In an action for deceit in the sale of a farm, the evidence tended to show that the farm though in the same town where both parties lived, was in a remote part thereof, with which the plaintiff was unacquainted; that she proposed on three occasions to the defendant to take her there, and he promised so to do on some subsequent day, and put her off on various pretences; that he hurried the matter to completion within forty-eight hours,

and thus deprived the plaintiff of time for inquiry and examination; and that the plaintiff was justified by the defendant's position in life and her long acquaintance with him in reposing confidence in his statements. *Held*, that the court could not say, as matter of law, that the plaintiff was so careless in trusting the defendant, and in not examining the farm before taking a deed thereof, that she should be precluded from recovery, and that the question of her negligence was properly submitted to the jury. *Brady v. Finn*, 260.

DECLARATION.

See DAMAGES, 3; DECEIT, 1; EXCEPTIONS, 14; INSURANCE, 9, 11; NEGLIGENCE, 16, 18; PARTNERSHIP, 3; POOR DEBTOR, 8; VARIANCE, 1, 2.

DECREE.

See ESTATES OF PERSONS DECEASED; GRADE CROSSING, 3.

DEED.

1. If a deed fixes exactly the location of all the lines and boundaries of the land conveyed, its construction cannot be controlled or affected by parol evidence. *Olson v. Keith*, 485.
2. A deed described the land conveyed as beginning at a point in the line of a private way, which ran westerly from C. Street, at the southwest corner of A.'s lot, thence northerly in a line parallel with C. Street and by the land of A. a certain number of feet to an angle, thence northwesterly "in line of a stone wall" and by land of B. a certain number of feet, "more or less, to a point," thence southerly "in a line parallel with said C. Street" a certain number of feet, more or less, to the line of the private way, and thence by the way "sixty feet" to the place of beginning. A survey showed the length of two of the lines other than that on the private way to be somewhat less than the distance stated in the deed, which was qualified in each instance by the words "more or less." *Held*, that this part of the description was controlled by the location of the lines and monuments; and that there was no legal ambiguity in the deed. *Ibid*.
3. A reservation in a deed of land from B. of "the right to use the drain across the easterly corner of said premises for the same purposes as heretofore used to said B., his heirs and assigns," the grantee covenanting with said B., his heirs and assigns, that he will allow said drain to remain open and to be used as heretofore, creates an easement of drainage, which passes by a subsequent deed from B. of the dominant land without express words. *Jones v. Adams*, 224.
4. A reservation in a deed of land of "the right to use the drain across the easterly corner of said premises" is not nullified by the fact that the drain empties into a cesspool on the servient premises, or by the fact that the line of the drain on the servient estate cannot be fixed without digging. *Ibid*.

5. The covenants of freedom from encumbrances and of warranty in a deed of land, over which an easement of drainage has been reserved in the prior conveyance to the grantor, apply to the estate as subject to the right of drainage. *Jones v. Adams*, 224.
 6. There is no presumption that the recital in the deed of an administrator can be taken to be true as against the heirs. *Arnold v. Reed*, 438.
 7. The owner of a tract of land divided it into lots, each of which he conveyed subject to the conditions and restrictions that "the grantee shall within one year from the date hereof cause to be erected on the premises granted a dwelling-house to be exclusively used as a residence for a private family; and no other buildings except the necessary outbuildings requisite and to be used exclusively for domestic purposes shall ever be erected thereon." *Held*, that these conditions and restrictions were inserted for the benefit of purchasers who took deeds subject thereto, and that they could be enforced in equity by and against such purchasers and their grantees. *Hopkins v. Smith*, 444.
 8. The right of entry on breach of condition subsequent cannot be assigned to a stranger, and if conditions and restrictions in deeds are for the benefit of purchasers and their grantees, they cannot be released to a subsequent purchaser or his grantee without the assent of the other purchasers or their grantees for whose benefit the restrictions were imposed. *Ibid*.
- See CONSTITUTIONAL LAW, 3; EASEMENT, 5; EQUITY, 1; ESTOPPEL; LEASE, 5; PARTY WALL; QUIETING TITLE; WAY.

DEFINITIONS.

See WORDS.

DEMAND.

See CONTRACT, 10; PROMISSORY NOTE, 1, 2.

DEPOSITION.

Although a witness, whose deposition is taken out of the Commonwealth, annexes copies instead of the originals of papers to the deposition, the court in its discretion may allow them to be read. *L'Herbette v. Pittsfield National Bank*, 137.

See NEW TRIAL, 4, 5.

DESCENT AND DISTRIBUTION.

See CONSTITUTIONAL LAW, 2.

DEVISE AND LEGACY.

1. Real estate specifically devised is, in the absence of a contrary intention on the part of the testator, exonerated from a mortgage placed upon it by

him, though the personal estate may be insufficient for the payment of general legacies. *Brown v. Baron*, 56.

2. A testator, by his will, bequeathed the residue of his estate to A. and B., the latter of whom was the testator's brother in law, "to be equally divided between them, share and share alike to them and their heirs and assigns." *Held*, that on the death of B. in the lifetime of the testator the legacy to him lapsed. *Horton v. Earle*, 448.
3. A brother in law is not a relation within Pub. Sts. c. 127, § 23. *Ibid*.
4. A devise and bequest to the testator's wife of "all my personal and real estate, to have and to hold for her use and her benefit during her natural life, with the right to dispose of the same by gift or will at her decease," and "should she decease without will or testament, or any actual conveyance to others of the right of said estate at her decease, then the real estate or its value shall be divided as follows, namely," gives the widow merely a life estate with a power of disposition. *Collins v. Wickwire*, 143.
5. A bequest to the wife of a testator of "all the residue and remainder of my property and estate, real and personal, of which I may die seised or possessed, or to which at the time of my decease I may be in any way entitled," standing alone, would give the wife an absolute fee; but when immediately followed by the qualifying words "for her support, and for the support and education of our only child," and with a further provision that what shall remain at the death of the wife shall go to the son, "his heirs, executors, administrators, or assigns forever," and a clause at the conclusion of the residuary bequest giving the wife power "to sell and dispose of any real or personal estate, . . . either at public or private sale, as she may deem best," it shows that it was not the intention of the testator to give his wife the fee. *Baker v. Thompson*, 40.
6. A testator, by his will, gave to his wife one seventh part of the residue of his estate, "to be disposed of as she shall think best, but if any part of her said seventh part shall not be disposed of at the time of her decease then the part of her seventh part remaining undisposed of at her decease shall be equally divided among my said six children," and added that the gift was made to her "in lieu of dower and distributive share of my personal estate." *Held*, that the wife took one seventh part of the residue absolutely, and that it passed to the devisees under her will. *Knight v. Knight*, 460.
7. A testator, by his will, gave one hundred thousand dollars in trust, one half of the income thereof to be paid from time to time to his two granddaughters in such sums and at such times as the trustee should in his discretion consider for the best interest of the beneficiaries, and any balance of income that might from time to time remain was to be added to the principal. He then authorized the trustee, if his grandchildren or either of them should be married, at his discretion "to make and pay to them severally and to each of them such sum or sums as he may consider reasonable and proper as an advance or marriage portion from the said principal sum or its accumulations." If either of the granddaughters should decease leaving lawful issue, one half of the principal and its accumulations "less any advance by way of marriage portion which may

have been made to such granddaughter" should go to such issue, and if either granddaughter should de cease without leaving issue then the sum and its accumulations "less any advance by way of marriage portion which she may have received" was to be held in trust for the surviving grandchild; and if such surviving grandchild should die without leaving issue, the sum and its accumulations were to go to the testator's heirs at law. One of the granddaughters married, and soon afterward the trustee paid to her the sum of five thousand dollars as an advance or portion under the power. *Held*, that the trustee was authorized to make such an advance by way of a marriage portion only; that the testator did not intend that the whole of the principal sum should be so advanced, and that, by the payment of five thousand dollars to the granddaughter who married, the power of the trustee to make an advance as to her by way of marriage portion was exhausted. *Croft, petitioner*, 22.

See CONSTITUTIONAL LAW, 2; EXECUTOR, 1, 2; QUIETING TITLE, 1, 3;
SUPREME JUDICIAL COURT, 8; TAX.

DISSEISIN.

See BOUNDARY, 3.

DIVIDEND.

See ACTION, 6; CORPORATION, 2; GUARANTY.

DIVORCE.

See ADULTERY.

DOMICIL.

See ADULTERY.

DOWER.

See DEVISE AND LEGACY, 6.

DRAIN.

See DEED, 3, 5; EASEMENT; EQUITY, 2; ESTOPPEL.

DUE CARE.

See EVIDENCE, 27, 39; HIGHWAY, 3; INFANT, 1; LAW OF THE ROAD;
MASTER AND SERVANT, 5, 7; NEGLIGENCE, 2-5, 7, 9, 10, 12, 14, 19,
21, 22.

EASEMENT.

1. The acquisition of a prescriptive right to use a wooden drain across neighboring land is not prevented by the laying of an earthen drain inside the wooden one. *Shaughnessey v. Leary*, 108.
2. The fact that a drain is laid at the joint expense of the owners of the dominant and servient estates does not import, as matter of law, that the use thereafter is permissive. *Ibid.*
3. The acquisition of a prescriptive right to use a drain for the discharge of sink water is not prevented by the use of it also for the discharge of water-closets during a part of the twenty years. On the other hand, if the prescriptive right is only to use the drain, by gaining the former right the dominant owner does not necessarily gain the latter. *Ibid.*
4. The registry laws do not extinguish easements by prescription in favor of purchasers without notice. *Ibid.*
5. A reserved right of drainage through an existing drain is not destroyed by the fact that the drain was once enlarged at the joint expense of the owners of the dominant and servient estates. *Jones v. Adams*, 224.

See DEED, 3-5, 7, 8; EQUITY, 1, 2; WAY.

EDUCATION.

See TAX, 3.

ELECTION.

See LEASE, 4; TRIAL, 9, 10.

ELECTRICITY.

See EMPLOYERS' LIABILITY ACT, 2.

ELEVATOR.

See NEGLIGENCE, 5.

EMBEZZLEMENT.

See EVIDENCE, 22; TRIAL, 10.

EMINENT DOMAIN.

1. The existence of a dam without a mill on land suitable for a mill site does not give the owner of the land a right, under the Pub. Sts. c. 190, to flow lands of upper riparian owners, but, as the land may have a greater market value on that account, it is proper in estimating the damages occasioned by the taking thereof by the right of eminent domain to take

into consideration its value as a mill site, not only in connection with the water power then existing, but also in connection with the right which might thereafter be acquired by the flooding of the lands of upper riparian owners, the limit to the inquiry as to the possible future use of the land being left to some extent to the discretion of the presiding judge. *Fales v. Easthampton*, 422.

2. At the trial of a petition for the assessment of damages occasioned to the owner of a dam and of laud suitable for a mill site by the diversion of water from the stream above the dam, and by the laying of pipes in the land below the dam, it appeared that the petitioner could not raise a head of water of any practical value, or obtain a reservoir as high as the dam, except by flowing lands belonging to others. The jury were instructed, in substance, that in estimating damages they were to allow the petitioner nothing on account of the dam; that they were to take into account the facts that the petitioner could flow back only about eighty rods on his own land, by doing which he could raise a head of no practical value; that by raising a head of water of practical use lands belonging to others would be flowed, which he could not do without paying them adequate damages therefor; that damages were not to be awarded in reference to the particular situation or circumstances or plans of the owner; but that they might award him such damages as he sustained by the taking of such water and rights as the respondent had been shown by the evidence to have taken, and such damages to his land as it had suffered by the laying of pipes in it, in view of such uses as the same, considered as property, could be profitably applied to, as shown by the evidence. *Held*, that the instructions were correct. *Held*, also, that the refusal to rule that the petitioner's water power "consisted in the difference of level between the surface where the brook first touches and where it leaves his land" gave the respondent no ground of exception. *Ibid*.

See EVIDENCE, 8, 9.

EMPLOYERS' LIABILITY ACT.

1. A car in use by or in the possession of a railroad company is to be considered a part of the ways, works, or machinery of the company using or having the same in possession, within the meaning of St. 1887, c. 270, whether such car is owned by it or by some other company. *Bowers v. Connecticut River Railroad*, 312.
2. A wire, which is a part of the electric signal system of a railroad, used to connect the joints of the rails so as to insure the transmission of the electrical current, affixed to the rail at either end by a bolt, and running along the rail until it reaches a sleeper, then running out on the sleeper in a loop, and fastened at the end and each corner of the loop by staples, is a part of the "ways, works, or machinery" of the railroad, within St. 1887, c. 270, § 1, cl. 1. *Brouillette v. Connecticut River Railroad*, 198.
3. A notice to an employer that, at a time and place named, his servant was instantly killed by "the falling of a derrick upon him on account of the

same being improperly or insecurely fastened," sufficiently states the cause of the injury to permit a recovery under St. 1887, c. 270, § 1, cl. 1 or 2. *Brick v. Bosworth*, 334.

4. At the trial of an action under the employers' liability act, St. 1887, c. 270, §§ 1, 2, for the death of the plaintiff's husband while in the defendant's employ, caused by the fall upon him of a derrick, which was alleged to have been in a defective condition and negligently managed by the defendant's superintendent, the plaintiff is entitled to have the jury instructed that "the same care that people of ordinary prudence would exercise under the same circumstances" was all that was required of the deceased. *Ibid.*
5. In an action under the employers' liability act, St. 1887, c. 270, for personal injuries occasioned to the plaintiff while in the defendant's employ by the negligence of A, there was a great deal of evidence, which was uncontradicted, to show that A. was regularly working with five or six other men in the defendant's service; and that he was paid the same price for his work as his fellow laborers. It was proved and not disputed that B. was the defendant's general superintendent, in charge of the work of these men and others engaged on the same job; and that he had other duties which took him away from the building for a considerable part of the time. It also appeared that C. was a foreman under him, whose special work was with the carpenters, and who hired men and exercised superintendence, more or less, in B.'s absence, on that part of the work where A. was engaged, which was connected with the carpenters' work. The evidence tended to show that A. received orders from B. or C. in regard to the work to be done by himself and those working with him, and gave his fellow laborers directions about the work in the absence of B. *Held*, that there was no evidence to warrant a finding that A.'s sole or principal duty was that of superintendence, within § 1, cl. 2, of the statute. *Dowd v. Boston & Albany Railroad*, 185.

See MASTER AND SERVANT, 1.

ENCUMBRANCE.

See DEED, 5; LEASE, 5, 6.

ENTRY.

See ASSAULT, 2, 3; LEASE, 8.

EQUITY.

I. Jurisdiction and General Principles.

1. If the reservation of an easement in a deed is express, upon a bill in equity to establish the easement this court will not consider the doctrine of easements reserved by implication. *Jones v. Adams*, 224.

2. A bill in equity to establish a right of drainage by an existing drain through land of another may be maintained, if the right is denied, although the drain has not been actually obstructed or stopped by the owner of such land. *Jones v. Adams*, 224.
3. A claim of a receiver of a corporation established under the laws of another State, and having its place of business therein, for a part of a subscription for its capital stock, is a simple claim for a debt, and is made nothing more by a fraudulent but vain pretence of paying it. Therefore a bill in equity cannot be brought to compel its payment, and the equitable remedy, if any, must be pursued in the State in which the corporation was organized. *Andrews v. Moen*, 294.

See CORPORATION, 2-4; DEED, 7; LEASE, 2; PARTY WALL; SPECIFIC PERFORMANCE.

II. Pleading and Practice.

4. When the plaintiff alone appeals from a decree granting him an injunction, whether the defendant can contest the right on which the injunction is founded, *quære*. *Shaughnessey v. Leary*, 108.
5. No objection lies to the report of a special master if the matters determined by him as stated therein were involved in the issue made up by the parties, and were properly considered by him and included in the report. *Clement Manuf. Co. v. Wood*, 173.

See SUPREME JUDICIAL COURT, 8.

ESTATES OF PERSONS DECEASED.

The estate of a deceased person was represented insolvent, and commissioners were appointed who allowed the claim of a creditor, and the administrator appealed to this court, where, by a decree of a single justice, from which no appeal was taken, the claim was established, and the cause was remanded to the Probate Court in which a copy of the decree was filed. Subsequently one of the original commissioners resigned and another one was appointed in his place, and further proceedings were had before the commissioners wherein other claims were passed upon by them. *Held*, that the later proceedings of the commissioners did not affect the validity of the decree of this court, and that the creditor whose claim was thereby established was entitled to prosecute a petition to the Probate Court to compel the administrator to file a bond with sufficient sureties, and to collect certain assets of the estate consisting of property alleged to have been conveyed by the intestate in his lifetime in fraud of his creditors. *Ripley v. Collins*, 450.

See CONSTITUTIONAL LAW, 2; DEED, 6; DEVISE AND LEGACY, 1; EXECUTOR; PARENT AND CHILD, 3; QUIETING TITLE, 1, 3; SUPREME JUDICIAL COURT, 7, 8; TAX.

ESTOPPEL.

An estoppel to claim a right of drainage is not necessarily established by proof of declarations by the person claiming such right, to the effect that he did not claim under a deed expressly conveying it; especially when there was no intention to mislead and no change of position on the part of the person setting up such estoppel, in consequence of such declarations. *Jones v. Adams*, 224.

See EXECUTOR, 2, 3; JUDGMENT; PARENT AND CHILD, 3; WAY, 2.

EVIDENCE.

1. The mere fact that, at the trial of an action, a collateral issue may be raised, is not of itself enough to justify the exclusion of evidence which bears upon the issue on trial. *Bemis v. Temple*, 342.
2. In an action for injuries occasioned by the plaintiff's horse becoming frightened at a flag suspended across a street in a town, and for the suspension of which the defendant is responsible, evidence is admissible to show that ordinarily safe and gentle horses have been frightened at the flag on other occasions. *Ibid.*
3. On the trial of an indictment for murder, photographs taken only three hours after the homicide, showing the condition of the premises at the time of the discovery of the crime, and verified to the satisfaction of the court, are admissible in evidence to assist the jury in understanding the situation of affairs at the time and place of the commission of the homicide; and the fact that the defendant did not deny the killing does not affect the competency of the evidence. *Commonwealth v. Robertson*, 90.
4. In an action for breach of a promise of marriage, there was evidence tending to show that the plaintiff had negro blood in her veins; and that, in making statements to the defendant regarding her parentage, she suppressed that fact. The plaintiff was allowed to introduce in evidence photographs of her parents and sister, and of the latter's children, which she testified were correct likenesses, and had been shown by her to the defendant. *Held*, that no error appeared. *Van Houten v. Morse*, 414.
5. At the trial of an indictment for rape upon a girl alleged to be under sixteen years of age, her testimony as to her age, even if hearsay, is competent; and an instruction that to determine her age the jury may take into consideration her appearance in connection with her testimony is correct. *Commonwealth v. Phillips*, 504.
6. In an action for goods sold and delivered, the defence to which is a breach of warranty of the quality of the goods, statements of a third person, who is not shown to have any connection with the plaintiff, in regard to the proper mode of using the goods, are rightly excluded. *Noble v. Fagnant*, 275.
7. If a part of a circular relating to an article of merchandise is put in evidence by the defendant, in an action for the price of the article, he has no ground of exception to the admission of the whole of the circular on the offer of the plaintiff. *Ibid.*

8. At the trial of a petition for the assessment of damages for the taking of land to widen a street in a town, a witness, who on his direct examination had testified to the price paid two months before the taking for a vacant lot in the vicinity of the land taken on the same street, was asked, on cross-examination, what price was paid two months after the taking for a large lot of land, upon which were a house and a stable, directly opposite the other lot testified to. This evidence was excluded. *Held*, that it could not be said, as matter of law, that the judge erred in finding that the lot as to which the evidence was offered was not sufficiently similar to the petitioner's land, and in excluding the evidence. *Amory v. Melrose*, 556.
9. At the trial of a petition for the assessment of damages occasioned to the owner of a dam and of land suitable for a mill site by the diversion of water from a stream above the dam, it appeared that the petitioner could not raise a head of water of any practical value or obtain a reservoir as high as the dam except by flowing land belonging to others, and evidence was admitted on the question of the value of the land as a mill site and of the uses which could be made of a reservoir so obtained. *Held*, that evidence offered by the respondent as to the value of the land of upper riparian owners which would be flowed by the petitioner's dam if a full reservoir were maintained was improperly excluded. *Fales v. Easthampton*, 422.
10. In an action against a city for personal injuries occasioned by falling upon the sidewalk of a street, if the plaintiff contends, and the defendant denies, that at the time of the accident there were ridges of ice upon the walk and depressions in the walk of such a nature as to cause water flowing thereon from the adjoining land to accumulate in such depressions and freeze, evidence that at various times during the same season and before the accident water had been seen coming from the adjoining land, and ridges of ice had been formed upon the walk, and that upon many occasions during the three months before the accident, when the sun shone or it was thawing weather, water ran from the adjoining land upon the walk and froze there, is competent to show that there was such a condition of things that ice was liable to form on the sidewalk. *Upham v. Salem*, 483.
11. On the question whether the illness of the plaintiff was caused by lead poisoning from inhaling dust containing white lead coming from the rubber thread on which he worked in the defendant's mill, evidence is competent that other persons, some of whom worked at the same time in the same room with the plaintiff under similar conditions, and some of whom worked there under similar conditions a few months before and a few months after him, were ill from lead poisoning; that a former employee of the mill, after working there for three and a half or four months, a short time before the plaintiff was there, was ill and had the same symptoms; and that a physician, at a time which he could not fix exactly, had a number of like cases in patients coming from the same room of the defendant's mill. *Shea v. Glendale Elastic Fabrics Co.* 463.
12. In an action against a railroad corporation, under the employers' liability

act, St. 1887, c. 270, for causing the death of C., it appeared that he was run down and killed by the defendant's engine while standing on the main track of the railroad with his back to the approaching engine, working at a coal car which was on the same track and which was run into; and that the switch had been set so as to send the engine on to a loop track, and the head brakeman changed the switch with the knowledge of the engineer. The defendant put in evidence that C. had orders to remain at the switch until the train had gone on its way by the loop track, and that he had told the engineer that he would do so. This evidence was disputed; and, in corroboration of it, evidence was offered that until the accident C. always had been there. *Held*, that the evidence so offered should have been admitted. *Cloutier v. Grafton & Upton Railroad*, 471.

13. In an action for causing the death of C., if a witness for the defendant, having testified on direct examination to a conversation with C. after the accident, on cross-examination concerning it testifies to a similar conversation at a later date, the plaintiff may contradict the later conversation in rebuttal. *Ibid*.
14. In an action against a national bank for money deposited at the bank with its cashier, it appeared that the money was sent by the plaintiff to the bank at different times, with slips or tickets in substance like ordinary slips or tickets accompanying deposits; that the money was withdrawn on orders addressed to the bank, resembling ordinary checks; and that the sums so paid in and so withdrawn were entered by the cashier on an envelope, and the entry in one instance was verified by his initials, thus: "E. S. F., Cas." *Held*, that the envelope was admissible in evidence. *L'Herbette v. Pittsfield National Bank*, 137.
15. In an action against a national bank for money deposited at the bank with its cashier, upon the agreement that the money should be invested by the bank in stocks and bonds, if the issue is whether the plaintiff dealt with the cashier as an individual or as the representative of the bank, evidence of former transactions similar in kind are competent. *Ibid*.
16. In an action against a national bank for money deposited at the bank with its cashier, upon the agreement that the money should be invested by the bank in stocks and bonds, the issue being whether the plaintiff dealt with the cashier as an individual or as the representative of the bank, a broker testified that his firm bought certain shares of stock for the defendant bank, taking the certificate in the plaintiff's name, and that his firm had had another account with the bank for several years. *Held*, that a receipt for shares of said stock in the plaintiff's name from the witness's firm signed by the defendant's cashier as such, previously to the transaction in suit, was admissible in evidence. *Ibid*.
17. In an action against a national bank for money deposited at the bank with its cashier, upon the agreement that the money should be invested by the bank in stocks and bonds, the issue being whether the plaintiff dealt with the cashier as an individual or as the representative of the bank, a witness, who was the bookkeeper of the bank, testified that the bank had accounts with brokers in two cities named who bought and sold stocks for its customers if ordered through the bank; and that these brokers, on

- occasions prior to the transaction in suit, had bought for the bank certain shares of stock for which certificates were by its direction, as shown by other evidence, taken in the plaintiff's name. *Held*, that the testimony was competent. *L'Herbette v. Pittsfield National Bank*, 137.
18. Evidence to show that a bank did not enter on its books a person's name as a depositor is incompetent, in an action by such person against the bank for money deposited at the bank with its cashier, upon the issue whether the plaintiff dealt with the cashier as an individual or as the representative of the bank, the cashier agreeing that the money should be invested by the bank in stocks and bonds. *Ibid*.
19. In an action against a national bank for money deposited at the bank with its cashier, upon the agreement that the money should be invested by the bank in stocks and bonds, the issue being whether the plaintiff dealt with the cashier as an individual or as the representative of the bank, the question to a witness who had been a bookkeeper for the bank, "whether or not to his knowledge the plaintiff had any account with the bank" in certain years named, is rightly excluded, there being no suggestion that the witness knew anything about the transactions with the cashier. *Ibid*.
20. Entries in a defendant's books of account are not made admissible by the fact that the plaintiff has been seen looking over the books with no more definite evidence that he has seen the entries. *Cheney v. Cheney*, 591.
21. In an action against the members of a partnership upon a contract foreign in its nature to the regular business of the firm, and executed in the firm name by one partner without the knowledge of the other, the admissions of the former, not made at the time when the contract was executed, are not admissible in evidence against the latter in respect to the scope of the partnership business. *Taft v. Church*, 527.
22. At the trial of an indictment for embezzlement, a letter written by the defendant, after he had been arrested and before the indictment had been found by the grand jury, containing threats against the person to whom it was addressed, who was the general manager of the company from which the money was supposed to have been embezzled by the defendant, and who had made the complaint by which the preliminary proceedings were had whereby the defendant's alleged offences were brought to the attention of the grand jury, is competent evidence, its weight being for the jury; and its admission after the defendant has testified is within the discretion of the court, and affords the defendant no ground of exception. *Commonwealth v. Smith*, 508.
23. In an action by the receiver of a fraternal beneficiary association incorporated under St. 1888, c. 429, as amended by St. 1890, c. 341, to recover money alleged to have been wrongfully taken by the defendant from the funds of the corporation while a director thereof, documents and papers on which appear the signature or initials of the defendant in his own handwriting, wherein he is referred to as holding a certain office, are admissible in evidence to show that he was such an officer of the corporation. *Putnam v. Gunning*, 552.
24. In an action by the receiver of a fraternal beneficiary association incorporated under St. 1888, c. 429, as amended by St. 1890, c. 341, to recover

money alleged to have been wrongfully taken by the defendant from the funds of the corporation while a director thereof, an extract from a pamphlet is competent evidence, in connection with testimony that thousands of the pamphlets were being issued from the office of the corporation while the defendant was holding a certain office and afterwards, to show that he knew, as stated in such extract, that the reserve fund was held out to the members of the corporation and to the public as a trust fund for the payment of matured certificates, and that it could not be appropriated to any other use, and also to show that in like manner the proceeds of the monthly *per capita* tax and of the assessments were all to be deposited in securities with the Treasurer of the Commonwealth or held as a part of the reserve fund. *Putnam v. Gunning*, 552.

25. Where the evidence is conflicting, the question whether alleged confessions were or were not voluntary is rightly left to the jury. *Commonwealth v. Burrough*, 513.
26. In an action against a railroad corporation for personal injuries received by the plaintiff in alighting from the defendant's train in another State, the plaintiff being a resident of still another State, where the defendant has attachable property, evidence of the law of the last State, under which the plaintiff may, in a case of this kind, be deprived of a right to a trial by jury on the question of damages, and, upon the hearing before the judge, other matters in bar of the action may be presented to reduce the damages, is admissible to explain his conduct in bringing the action here instead of in the State of his residence. *Merritt v. New York, New Haven, & Hartford Railroad*, 326.
27. In an action against a railroad corporation for causing the death of the plaintiff's intestate, who was in its employ as a brakeman on a freight train, and who received the injuries which resulted in his death, while engaged in the night time in uncoupling cars, by striking against a switch-stand, which stood close to the track, and being knocked from the car, the plaintiff offered evidence as to the customary manner of uncoupling cars, as to the practice of conductors to do the uncoupling, as to whether the train ordinarily came up to the switch-stand, and as to the distance at which the switch-stand could be seen. *Held*, that the evidence was admissible upon the question whether the plaintiff's intestate was in the exercise of due care. *Goodes v. Boston & Albany Railroad*, 287.
28. In an action for personal injuries occasioned to the plaintiff, while in the defendant's employ, by the alleged defective condition of a machine upon which he was working, if the defect testified to by the plaintiff's witnesses is the state of the pulleys which were used in running the machine, and there is evidence that the pulleys were in the same condition at the time of the trial, that the working condition of the machine was the same, and that the speed of the engine and machinery was the same at the time when the speed was taken as at the time of the accident, evidence of what that speed was, that the machine and pulleys were in good condition at the time of the trial and at other times shortly before and after the accident, and that the machine worked perfectly before and ever since the accident, is competent; the admission of such evidence being limited to the purpose of

showing what the condition of the machine was, and how it operated at the time of the accident. *Tremblay v. Harnden*, 383.

29. At the trial of an action for damages caused by the destruction of ice-houses by fire communicated by the locomotive engines of the defendant railroad, the plaintiff, who is a lessee of the premises under a lease requiring him to keep the houses insured to an amount sufficient to repair or replace them in case of destruction or damage by fire, cannot be asked by the defendant the valuation of the property by the assessors for the purposes of taxation to prove the damages, or how many tons of ice he had insured in the houses when burned. *Anthony v. New York, Providence, & Boston Railroad*, 80.
30. At the trial of an action for damages caused by the destruction of ice-houses by fire communicated by the locomotive engines of the defendant railroad, the defendant attempted to show by two witnesses that the ice was polluted by the sewage of a neighboring city, and therefore was unmerchantable and of little value. *Held*, that it was sufficient to say that, so far as the testimony was excluded against the objection and exception of the defendant, it did not appear that the witnesses had such actual knowledge of the condition of the pond at the time when the ice was taken from it as to make the testimony necessarily competent, and as the testimony was somewhat in the nature of an opinion or inference from facts observed at times somewhat remote from the time in question, it was in the discretion of the presiding justice to exclude it on the ground of remoteness. *Ibid*.
31. In an action for personal injuries occasioned to the plaintiff while in the defendant's employ by the falling on him of shafting and pulleys fastened to beams overhead in the defendant's factory, one of the issues was whether the defendant had properly inspected the shaft, and he introduced testimony to show that he had done so before the shaft was started, and from day to day while it was running, the witnesses testifying that the shaft ran without vibration, and that standing on the floor they could see if it or the pulleys oscillated an eighth of an inch. The defendant then called an expert, and asked him, "Can you state whether or not an experienced person, looking at a shaft revolving, and pulleys upon that shaft revolving two hundred and fifty revolutions a minute, whether a person can see whether it ran true or not?" and also, "Whether a person standing upon the floor, an experienced person standing upon the floor, and watching this, can see any oscillation?" Both questions were excluded. *Held*, that even if it did not appear what the answer to the last question would be, it was to be inferred that it would be to the effect that any oscillation could have been seen by an experienced person in that position; and, assuming that the first question was objectionable in form, the last should have been admitted, as the subject was not one within the common experience of men. *Ouillette v. Overman Wheel Co.* 305.
32. A witness cannot testify as to what he understood by a word in a letter to him, if the word is not a technical term, has no peculiar or local signification, and there are no extrinsic facts to create ambiguity, and if also, so

far as appears, the witness has no better means of understanding the word than the jury. *First National Bank of Greenfield v. Coffin*, 180.

83. A witness who was offered as an expert upon the market value of real estate knew nothing about it except what he was told by others, and what he saw of it during a visit of six days. He was permitted to state the facts he observed tending to show its value; and there was nothing to indicate that the judge erred in holding that the witness had no such actual knowledge of market values in the place of location as to make his opinion competent. Moreover, the time to which his information related was more than a year and a half after the time of the alleged fraudulent sale in question, and his statement as to the condition of the buildings on the property indicated a great depreciation in values. *Held*, that the witness had no such knowledge of the market value of real estate at the place of location as to entitle him to give an opinion in regard to it, and that the testimony might well have been excluded on the ground of remoteness. *Ibid*.
84. At the trial of an action on a policy of insurance against loss by fire, in which the subject of the insurance is described as a "frame dwelling-house," when it is in fact a hotel, testimony offered by the assured of what took place at the issuing of the policy, for the purpose of showing that the property was fully described to the agent of the insurer, and that the description contained in the policy was his description, was rightly excluded, as, if admitted, it would have tended to vary the written contract. *Thomas v. Commercial Union Assurance Co.* 29.
85. Evidence of the circumstances under which a written agreement for a sale of land was entered into, and the acts and declarations of the parties under it, are admissible for the purpose of assisting in interpreting and applying the agreement, but not for the purpose of contradicting or varying its terms. *Bassett v. Rogers*, 47.
86. The plaintiff agreed in writing to convey land to the order of the defendant, for a price named, and to pay him a brokerage commission for effecting a sale of it. The defendant sold the land for a sum larger than the price named by the plaintiff, and retained the difference himself, and charged the plaintiff his commission. *Held*, in an action to recover the difference, that the plaintiff should have been permitted to show that his property had been and was in the hands of the defendant for sale as a broker on commission before and at the time of signing the agreement, as well as what representations were made by the defendant as to his object in taking the agreement, and its purposes so far as he was concerned, as, if they were of the nature which the plaintiff offered to show, they had a tendency to show that the agreement was procured by fraud and misrepresentation on the part of the defendant. *Ibid*.
87. In an action against a town for injuries occasioned by a defect in the highway, the testimony of an inhabitant and taxpayer of the town, who at the time of the accident was walking with the plaintiff, that within thirty days after the accident he had conversations with the chairman of the selectmen, the superintendent of streets, and the chief of police respecting the time, place, and cause of the injury, is competent for the purpose of

showing that the defendant was not misled by a notice given by the plaintiff erroneously stating that the injury was caused by his falling "over the root of a tree on the sidewalk of Central Park Avenue," when in fact the accident occurred on Hyde Park Avenue near the junction of the two ways, and, if believed by the jury, would justify them in finding that the defendant was not misled by the inaccuracy of the notice. *Fuller v. Hyde Park*, 51.

38. At the trial of a complaint for keeping intoxicating liquors with intent unlawfully to sell the same, evidence that a deputy marshal of the United States went to the defendant's house not very long after the time of the alleged illegal keeping, and in reply to a question told him he was wanted for a violation of the United States revenue laws in selling intoxicating liquors without having paid a United States revenue tax, and that the defendant replied that he meant to have paid it and would do so now, and inquired how much the fine would be, and offered to pay it, is competent in connection with other evidence tending to show the defendant's guilt, and the term "intoxicating liquors" must be presumed to have been used by the marshal in its ordinary sense, and to have referred to liquors the sale of which without a license is unlawful. *Commonwealth v. Kyne*, 146.
39. Evidence that a person in the employ of a railroad corporation has boasted of his ability to keep out of the way of trains and not get hurt, is admissible in an action by him against the corporation for personal injuries occasioned by being run over by a train while, in the course of his employment, crossing the tracks upon which trains were passing in opposite directions. *Brouillette v. Connecticut River Railroad*, 198.
40. A confession in writing by a wife to her husband, shown by her to no other person, of her guilty relations with another, is not competent evidence against the latter, in an action by the husband for the alienation of his wife's affection. *Sanborn v. Gale*, 412.
41. Evidence of good reputation is not competent to show that one is not guilty of a dishonorable or unlawful act which is not punishable as a crime. *Lamagdelaine v. Trenblay*, 339.
42. While in an action for money lent, or in an action on a promissory note where the consideration is money lent, the defendant may show that the person claiming to have lent the money had no money to lend, and may show his financial condition, he cannot introduce evidence of his financial reputation. *Bliss v. Johnson*, 323.

See ASSAULT, 3; AUDITOR, 1; BURDEN OF PROOF, CITY, 2; CONTRACT, 1, 6, 8; CONVICTION; CORPORATION, 4; DAMAGES, 4; DEED, 1; DEPOSITION; EMINENT DOMAIN, 1; EXCEPTIONS, 6-8, 12; EXPERT: HUSBAND AND WIFE; INSURANCE, 6; INTOXICATING LIQUORS, 3-5; LEASE, 7; LIMITATIONS, STATUTE OF, 3; MECHANIC'S LIEN, 3; MONEY LENT; NEGLIGENCE, 8; NEW TRIAL, 2-6; PERJURY; PRINCIPAL AND AGENT; PROMISSORY NOTE, 1, 2, 6; SUPREME JUDICIAL COURT, 5; TRANSFER OF STOCK, 3; TRIAL, 4, 8, 10, 11, 13, 15, 17; VARIANCE; VERDICT; WITNESS.

EXCEPTIONS.

1. Under the 81st Rule of the Superior Court a notice of the filing of exceptions left at the office of the attorney of the adverse party in his absence is not duly served unless he actually receives it. *Foley v. Talbot*, 462.
2. If a bill of exceptions states that certain requests for rulings were presented to the judge, who declined to give them, and that the exceptions allowed are to "this refusal to rule as requested and the rulings of the court as made," and contains the judge's charge reported in full, the exception to "the rulings of the court as made" may be treated, not as an exception to the charge as a whole, but as saving exceptions to those rulings which were at variance with the rulings requested, and to which the attention of the judge was specially directed by the requests. *Brick v. Bosworth*, 334.
3. No exception lies to the refusal to give instructions in the terms requested, if they are given in substance. *Noble v. Fagnant*, 275.
4. No exception lies to the refusal of the judge to repeat instructions which he has given to the jury. *Cheney v. Cheney*, 591.
5. No exception lies to the refusal of the judge presiding at a trial to rule, at the close of the plaintiff's evidence, that the plaintiff is not entitled to recover, if the defendant does not rest his case upon such evidence. *Goss v. Calkins*, 492.
6. An exception cannot be sustained to the exclusion of evidence which is contended to have been competent as tending to show a fact which has been found by the jury in favor of the excepting party. *L'Herbette v. Pittsfield National Bank*, 137.
7. An exception will not lie, in an action for personal injuries occasioned to the plaintiff while in the defendant's employ, to the admission in evidence of a conversation between the plaintiff and the agent of an insurance company which had insured the defendant against accidents, if the bill of exceptions does not show that the defendant was not present at the conversation, or that the plaintiff's statement of what occurred was objected to except as a part of a conversation between the plaintiff and the defendant which was rightly admitted in evidence. *Anderson v. Duckworth*, 251.
8. An exception to the admission of evidence, which it was within the discretion of the judge to admit when offered, although it might have been excluded until further testimony had been put in, cannot be sustained, if, no such testimony having been introduced, the excepting party, at the close of the evidence, did not request that the evidence objected to be stricken out, and the jury instructed to disregard it. *Brady v. Finn*, 260.
9. A point not taken at the trial is not open upon a bill of exceptions. *Van Deusen v. Steele*, 268.
10. If the instructions given to the jury by the presiding justice cover the rulings asked for by the defendant, and state the law correctly, the defendant has no ground of exception. *Ouillette v. Overman Wheel Co.* 305.
11. If at the trial of a complaint for unlawfully exposing and keeping intoxicating liquors for sale, reasons given to the defendant's counsel for refusing a ruling requested by him, and a ruling made in connection with

- such refusal, were no part of the instructions to the jury, and if they did the defendant no harm, even though erroneous, the defendant has no ground of exception. *Commonwealth v. Boutwell*, 230.
12. An exception, taken at the trial of charges of fraud filed by a judgment creditor, under Pub. Sts. c. 162, § 17, against his debtor, upon the latter's application to take the oath for the relief of poor debtors, to the admission of evidence which related solely to a charge of which the debtor was found not guilty, becomes immaterial. *Lamagdelaine v. Tremblay*, 339.
13. It is within the discretion of the court, to the exercise of which no exception lies, to decline to allow the defendant, in an action upon a judgment begun by trustee process, to withdraw a general appearance, and to overrule a motion for leave to defend the action as of the original suit. *Buller v. Buller*, 524.
14. If the declaration in an action contains four counts, and an exception is taken to the refusal of the judge to rule, as requested by the defendant, "that there was no evidence which would warrant the jury in finding a verdict for the plaintiff on the first, second, third, or fourth counts of the declaration, respectively," and the request, as applied to either count, embodies a correct proposition of law, and the defendant was prejudiced by the failure to give it in terms, the exception must be sustained. *Baker v. Commercial Union Assurance Co.* 358.
- See ASSAULT, 3; BREACH OF PROMISE OF MARRIAGE, 4; EMINENT DOMAIN, 2; EVIDENCE, 7; HUSBAND AND WIFE; NATIONAL BANK, 2; NEGLIGENCE, 11, 13; SAVINGS BANK, 1; SUPREME JUDICIAL COURT, 3; TRIAL, 2, 5, 7, 9, 10, 12, 15.

EXECUTION.

See APPEAL, 1; POOR DEBTOR, 11, 12.

EXECUTOR.

1. A residuary devise to the executor, with power to sell the real or personal estate, does not first vest in him the mere power to sell to create a fund for the payment of debts and legacies, with the right to have what may remain, but vests in him at once the title to the residue, with authority to sell any or all of the estate, and apply it to the payment of debts and legacies, and until a sale the rents and profits belong to him as residuary devisee. *Brown v. Baron*, 56.
2. An executor who, in his first account, erroneously charges himself with the rents of real estate to which he was himself entitled as residuary devisee, is not estopped from showing the mistake, and having it corrected. *Ibid.*
3. An executor, acting in good faith, bought with the funds of the estate in his hands shares of stock in a corporation, of which he was an officer and the principal stockholder; and the only persons interested in the estate approved the purchase. He resigned his trust, and, in settlement

with the administrator *de bonis non* of the estate, turned over to him a certificate for the shares so bought. The administrator accepted the same without protest, and for a long time after such transfer, and while he retained the shares and received dividends thereon and voted by proxy at the stockholders' meetings, the stock was worth as much as the amount of the trust funds invested therein, or more, and, if he had declined to receive the shares, or had within a reasonable time retransferred or redelivered the same to the executor, the latter could have sold them for an amount at least equal to their cost. The administrator retained the stock until, for causes for which the executor was not responsible, it became worthless. *Held*, in an action on the executor's bond, that he was entitled to be credited with the sum invested in the stock. *Thayer v. Kinsey*, 282.

See BENEFICIARY ASSOCIATION, 2; CONTRACT, 9; QUIETING TITLE, 1, 3; TAX, 1.

EXEMPTION.

See CONSTITUTIONAL LAW, 2; TAX, 3.

EXPERT.

1. Whether or not a person called as an expert witness shall be allowed to testify to his opinion in a case, while largely within the discretion of the presiding judge or officer, is yet a question of fact for his decision. *Amory v. Melrose*, 556.
2. At the trial of a petition for the assessment of damages for the taking of land to widen a street in a town in the vicinity of Boston, a person was called as an expert witness who had been long engaged in the real estate business in Boston, and was also an auctioneer. He had been making foreclosure sales in the vicinity of Boston for twenty years, and testified that he had sold land in all parts of the town in question; that he might have made twenty-five or thirty sales there, or double that number; and that he had made public sales of real estate in almost every town in the vicinity of Boston. Another person, also called as an expert witness, who had been in the real estate business for more than twenty years, although he had never bought or sold land in the town in question, testified that he had been familiar with the value of real estate in the vicinity of Boston, and with the cutting up of real estate. *Held*, that it could not be said, as matter of law, that the judge erred in finding the witnesses to be qualified as experts. *Ibid*.
3. In an action for personal injuries occasioned to the plaintiff's intestate by being struck and run over by a horse with a sleigh attached, a post-mortem examination more than four years thereafter revealing tumors in the cerebellum, a good practising physician of long experience who knows what the authorities say in regard to tumors may properly be permitted to answer in the following manner a hypothetical question as to the exciting

cause of the illness of the plaintiff's intestate, viz.: "From the result of the autopsy, knowing that there was a tumor of the brain, I presume that was the exciting cause of the troubles from which he suffered," although in his practice he had not been familiar with tumors on the brain and did not pretend to understand the cause of tumors. *Hardiman v. Brown*, 585.

4. A doctor of medicine may be competent to express an opinion upon the effect of pressure at the base of the brain, whether it arises from tumors or other causes, although he may never have been called to a case where tumors were known to exist there, and in determining the qualifications of a physician the extent of his reading in his profession may be considered as well as his experience. *Ibid.*

See EVIDENCE, 30-33; NEW TRIAL, 6.

FALSE REPRESENTATIONS.

See BREACH OF PROMISE OF MARRIAGE; DAMAGES, 2, 3; DECEIT.

FENCE.

The owner of land on one side and extending to the centre of a highway cannot, under St. 1887, c. 348, maintain an action against an owner of land on the opposite side and extending to the centre of the same highway, for maliciously maintaining, on the line of the highway opposite the plaintiff's land, a fence unnecessarily exceeding six feet in height, for the purpose of annoying the plaintiff. *Spaulding v. Smith*, 543.

See BOUNDARY.

FIRE DEPARTMENT.

See ACTION, 4.

FIRE INSURANCE.

See EVIDENCE, 29, 34; INSURANCE, 3-14.

FISH AND FISHERIES.

The provisions of Pub. Sts. c. 91, § 27, which impose a penalty for fishing in that portion of a pond, etc., in which fishes are lawfully cultivated or maintained, contemplate in terms that the fish may be cultivated in a portion only of the pond, and the fact that there are other riparian proprietors into whose waters the fish may swim does not prevent the conviction of a person for fishing in such portion of the pond without the permission of the proprietors. *Commonwealth v. Skatt*, 219.

FLOWAGE.

See EMINENT DOMAIN.

FORECLOSURE.

See PLEDGE.

FOREIGN CORPORATION.

See EQUITY, 3.

FOREIGN JUDGMENT.

The plaintiff brought an action against the defendant in another State of which they were both citizens, and on the same day another action, for the same cause, in this Commonwealth, by attachment of the defendant's property. Judgment in the first named action was entered in the plaintiff's favor while the proceedings in this Commonwealth were still pending. *Held*, that, while the defendant had the right to set up the judgment so obtained in bar of the plaintiff's right to recover in the action here, it was equally competent for the court, upon the plaintiff's application, to reopen the case after the hearing and before the finding, and allow him to file a replication setting up that the judgment had been vacated and was no longer in force, and to introduce evidence of that fact, and to find, if the evidence warranted it, that the judgment in that case had been vacated, and that the plaintiff was entitled to judgment in the action here. *Graef v. Bernard*, 300.

FOREIGN LAW.

See EVIDENCE, 23.

FORFEITURE.

See INTOXICATING LIQUORS, 1.

FORGERY.

A. prepared a forged check and delivered it to B. on the street, asking the latter to get a messenger boy to take it to the bank on which it was drawn and get it cashed. B. walked up the street until he found a boy, and then down the street until he was nearly opposite the bank, when he sent the boy with the check into the bank for the money. The boy obtained the money and gave it to B., who went into a store and got a bill changed and paid the boy for his services, and when B. came out of the store A was coming across the street to where B. was, and upon reaching him asked him if he had got the money, and received it from him less the sum paid the boy. *Held*, that A. could be convicted of uttering the check. *Commonwealth v. Clune*, 206.

FRAUD.

See APPEAL, 1; BENEFICIARY ASSOCIATION, 4; BREACH OF PROMISE OF MARRIAGE; CONTRACT, 11; DAMAGES, 2, 3; DECEIT; EQUITY, 3; ESTATES OF PERSONS DECEASED; EVIDENCE, 4, 36; EXCEPTIONS, 12; INSURANCE, 1; JUDGMENT; LIMITATIONS, STATUTE OF; POOR DEBTOR, 1-7.

FRAUDS, STATUTE OF.

If the jury find that the talk between a bidder and the auctioneer, at an auction sale of real estate, amounted to an agreement by the auctioneer to knock down the property to the bidder if he should bid a certain amount, and that was the highest amount bid, the agreement is within the statute of frauds, and an action by the bidder will not lie to recover damages for a breach thereof. *Boyd v. Greene*, 566.

See CONTRACT, 1; WAY, 2.

FRAUDULENT REPRESENTATIONS.

See BREACH OF PROMISE OF MARRIAGE; DAMAGES, 2, 3; DECEIT.

GAS.

See NEGLIGENCE, 6.

GIFT.

See SAVINGS BANK.

GOODS SOLD AND DELIVERED.

See BURDEN OF PROOF, 1; DAMAGES, 1; EVIDENCE, 6, 7; TENDER; TRIAL, 14.

GRADE CROSSING.

1. Premises which touch only at two corners that portion of a way within a railroad location discontinued under St. 1890, c. 428, do not in any proper sense abut upon such discontinued portion of the way, though they do upon other portions of it. *Nichols v. Richmond*, 170.
2. If a person has been obliged, in passing from one portion of his premises to another, to use a way of which a part on which his premises do not abut has been discontinued under St. 1890, c. 428, and, in consequence thereof, is compelled to use a longer and more circuitous and less convenient route over a new way substituted for and provided in place of the discontinued portion, he cannot recover damages for the inconvenience resulting from the discontinuance. *Ibid.*

8. Under St. 1890, c. 428, § 8, the Superior Court has authority to embody in a decree, confirming the decision of the commissioners appointed to prescribe the alterations of certain crossings of highways in a town by a railroad at grade, an order that the railroad company and the town "shall forthwith proceed to carry out the work of abolishing the grade crossings of said railroad at" the highways named "in the way and manner set out in the report of said commissioners"; and has authority also, under § 7 of the statute, to embody in such decree the appointment of an auditor, to whom shall be submitted all accounts of expenses incurred in doing the work. *Selectmen of Norwood, petitioners*, 564.

See NEGLIGENCE, 12, 13.

GRAND JURY.

See INDICTMENT, 6.

GRANT.

See DEED.

GUARANTY.

A statute which authorized a corporation to issue preferred stock provided that "the holders of said preferred stock shall be entitled to dividends upon the same annually, out of net profits, in preference and priority to the holders of any other stock of said corporation, to the amount of such rate per cent thereon, not exceeding seven per cent, as may be determined by vote of said corporation prior to issue of the same, which rate per cent of priority shall be expressed in the certificates of said preferred stock, and shall also share *pro rata* with the holders of the common stock in any excess divided in any year above a dividend on the whole stock at said rate per cent, and dividends to the holders of such preferred stock, at the rate per cent fixed upon, shall be paid for each year from the time of its issue, cumulatively, before any dividends shall be paid upon any other stock of said corporation, and, if so voted and expressed in the certificates, may be guaranteed by said corporation"; and also that "the provisions of law relative to special stock . . . shall not be held to apply in case of stock issued under this act." Prior to the issue of the preferred stock, the corporation determined by vote the rate of dividend to be paid and the form of certificate to be issued, which in its wording followed the statute, including a guaranty of the dividends. *Held*, that the effect of the guaranty was not to make the dividends payable absolutely, whether there were net profits or not, and without regard to the circumstances or situation of the corporation, but to add to the statutory liability the direct undertaking of the corporation that net profits which, in the fair judgment of the officers of the corporation, were available for dividends, should be

devoted first of all, as between the preferred stockholders and the holders of any other stock, to the payment of dividends on preferred stock. *Field v. Lamson & Goodnow Manuf. Co.* 388.

See ACTION, 6; CONTRACT, 5.

GUARDIAN AND WARD.

See MALICIOUS PROSECUTION.

HEARSAY.

See EVIDENCE, 5.

HEIRS.

See DEED, 6.

HIGHWAY.

1. A side of a street may be in such form, and so used, with the knowledge and acquiescence of a town, as to be a portion of the travelled part of the way which the town is bound to keep in repair, even though no work has been done upon it to fit it for the use of pedestrians. *Moran v. Palmer*, 196.
2. At the trial of an action against a town for injuries alleged to have been caused by a defect in a highway, the judge instructed the jury that the plaintiff could not recover unless the defect was "within the travelled way," and in explanation added the words "that is to say, so connected with it and so used for travel that it may fairly be said to be within the limits of the way, and in such a way as to make the travel upon it unsafe by reason of the want of repair so existing." *Held*, that the instructions were correct. *Ibid*.
3. At the trial of an action against a town for injuries occasioned by a defect in a highway, the plaintiff testified that he was "walking along quietly" or "comfortably" on the sidewalk with two other persons, when he tripped and fell; that there was an electric light "there somewhere," but that the reason for his not seeing the object over which he fell was that he "was talking with either Mr. or Mrs. N., and my face was turned away for one thing. I might not have looked at it. Another thing, I never supposed for a moment there was anything out of the way there." On cross-examination he testified, "Had I supposed it was a dangerous place I could have seen perfectly well by looking, but supposing it was all right I did not look." He also testified that he had previously avoided the sidewalk, and had walked in the street because of the loose stones and *debris* on the sidewalk, and the fear he had of falling; but that a short time before he fell his attention had been called to the sidewalk as being in a proper con-

dition to be waived over. *Held*, that, upon this evidence, the question of the due care of the plaintiff was properly submitted to the jury. *Fuller v. Hyde Park*, 51.

See CITY, 2, 3; COMPLAINT, 2; EVIDENCE, 10, 37; GRADE CROSSING; LAW OF THE ROAD; NEGLIGENCE, 3, 4, 12, 13; TRIAL, 18, 19.

HOSPITAL.

See ACTION, 2; BOARD OF HEALTH; TENANT AT WILL.

HUSBAND AND WIFE.

In an action by a husband for the loss of his wife's services and society, occasioned by an injury alleged to have been received by her through the defendant's negligence, if evidence of disturbed marital relations at particular times is admitted, but confined by direction of the judge to the question of damages, and the jury find for the defendant, the plaintiff has no ground of exception. *Sullivan v. Lowell & Dracut Railway*, 536.

See EVIDENCE, 40; INSURANCE, 1, 2; LIMITATIONS, STATUTE OF, 1, 2; PARENT AND CHILD; PERJURY; PROMISSORY NOTE, 4.

ILLEGALITY.

See CONTRACT, 3, 4.

IMPLIED CONTRACT.

See PARENT AND CHILD, 1.

IMPRISONMENT.

See POOR DEBTOR, 2.

INDICTMENT.

1. An indictment which begins with the words "Commonwealth of Massachusetts, Worcester ss.," and then describes the defendant as of Buckland in the county of Franklin, and alleges the offence to have been committed "at Westminster, in said county," does not allege with sufficient certainty that the offence charged was committed within the county of Worcester, and a motion to quash the same should be granted. *Commonwealth v. Wheeler*, 429.
2. An indictment for murder by stabbing with a knife need not allege in what way or in which hand the knife was held. *Commonwealth v. Robertson*, 90.

3. An indictment for murder, which avers that the death ensued from "one mortal wound" given on the head of the deceased by a knife, is sufficient without a more specific description of the wound. *Commonwealth v. Robertson*, 90.
 4. In an indictment for the murder of M. R., the day of the assault was given, the assault resulting in a mortal wound was described, and then followed the words "of which said mortal wound the said M. R. then and there died." *Held*, that the words "then and there" related to the time previously stated in the indictment as the time of the assault, and that they sufficiently stated the time of the death. *Ibid*.
 5. An indictment which charges an assault with a dangerous weapon, and, by way of further aggravation, that it was with an intent to "kill and murder," is not bad for duplicity or repugnancy; and the defendant may be acquitted of a part of the charge and convicted of the residue. *Commonwealth v. Clarke*, 495.
 6. If an indictment has been quashed, it is not necessary for the grand jury to examine the witnesses anew before finding a second indictment against the same person for the same offence; and the facts that some of the grand jurors who found the original indictment were absent when the second indictment was found, and that others were present when the second indictment was found who were absent on the former occasion, do not render the indictment invalid. *Commonwealth v. Clune*, 206.
- See ADULTERY; CONSTITUTIONAL LAW, 1; EVIDENCE, 3, 22; NEW TRIAL, 2; RAPE; TRIAL, 3-7, 9, 10.

INDORSER.

See PROMISSORY NOTE, 1-5; VARIANCE, 2.

INFANT.

1. If at the trial of an action for personal injuries occasioned to the plaintiff, a boy five years and six months old, by being run over by the defendant's team, the conduct of the plaintiff was such as the judgment of common men would universally condemn as careless in any child of sufficient age and intelligence to be permitted to go alone across a street on which teams are frequently passing, he was not in the exercise of due care and cannot recover. *Hayes v. Norcross*, 546.
2. The language of St. 1892, c. 318, § 7, which requires any person receiving under his care or control, or placing under the care or control of another, for compensation, an infant under two years of age, to give notice within two days to the State Board of Lunacy and Charity, includes any person receiving an infant and any person placing an infant under the care of another, and relates to the reception of one infant, and has no reference to other provisions of the statute which require a license; and if a mother places her child under the care and control of a person who receives the child and agrees to board, care for, and take control of him,

and then receives compensation for his board for the period of ten days, that person violates the statute if he does not give notice to said board within the two days. *Commonwealth v. Johnson*, 596.

See ACTION, 3; MASTER AND SERVANT, 5, 6; NEGLIGENCE, 9; PARENT AND CHILD.

INJUNCTION.

See EQUITY, 4; PARTY WALL; SPECIFIC PERFORMANCE.

INSOLVENCY.

See ESTATES OF PERSONS DECEASED.

INSOLVENT DEBTOR.

A preference given by an insolvent debtor to a *bona fide* creditor cannot be avoided by an attaching creditor, whether the form of preference which is adopted is a general assignment for the benefit of such creditors as shall assent thereto, or an assignment for the benefit of certain specified creditors, or an assignment directly to a single creditor. *Sawyer v. Levy*, 190.

INSTRUCTIONS.

See ADULTERY; ASSAULT, 3; BREACH OF PROMISE OF MARRIAGE, 4; BROKER; CONTRACT, 1; EMPLOYERS' LIABILITY ACT, 4; EMINENT DOMAIN, 2; EVIDENCE, 5; EXCEPTIONS, 2-5, 8, 10, 11, 14; HIGHWAY, 2, 3; INSURANCE, 11; INTOXICATING LIQUORS, 4; MASTER AND SERVANT, 3; NEGLIGENCE, 8, 11; NEW TRIAL, 5; PROMISSORY NOTE, 1, 6; SAVINGS BANK, 2; TRIAL, 4-6, 10, 12-16, 18, 20.

INSURANCE.

1. If a married woman who signs her husband's name, without his knowledge or consent, to an application for a policy of insurance which is issued upon his life for her benefit, and which, by the rules of the insurance company to which it is subject, is rendered void by her act, was innocent of any fraudulent intent, and was deceived by the agent of the insurance company and induced by his fraudulent representations to make the application, she can rescind the contract of insurance when she discovers the fraud, and recover back the amount of premiums paid by her on the policy. *Fisher v. Metropolitan Life Ins. Co.* 236.
2. There is no presumption of law that a married woman, who signed her husband's name, without his knowledge or consent, to an application for a policy of insurance, which was issued upon his life for her benefit, and which by the rules of the insurance company to which it was subject was rendered void by her act, knew the rules, which were not contained in the

application signed by her, but were printed in a small receipt-book which came into her possession after the policy was issued. *Fisher v. Metropolitan Life Ins. Co.* 236.

3. Where but one premium is paid for an insurance against loss by fire on two structures, the contract of insurance is entire, and if void in part is void altogether, and cannot be apportioned. *Thomas v. Commercial Union Assurance Co.* 29.
4. At the trial of an action on a policy of insurance against loss by fire, in which the property insured was described as a "frame dwelling-house," it appeared that for years previous to its purchase by the assured the structure had been used as a hotel, and was known to the assured, and generally, as the "Glen Hotel," or the "Glen," and at the auction sale in which it was purchased by the assured it was so described in the notice read by the auctioneer, while the number of rooms therein and their arrangement and purposes showed that as it stood, though unoccupied, it was a hotel, and not a dwelling-house. *Held*, that upon these facts it could not be regarded as a dwelling-house when insured, and the mere fact that the assured after purchasing the property put in a care-taker, who slept in one of the rooms, or the undisclosed intention of the assured to let it to a family, did not change the character of the structure. *Ibid*.
5. The description, in a policy of insurance against loss by fire, of a structure as a frame dwelling-house when it is in fact a hotel, is such a mis-description as will avoid the policy. *Ibid*.
6. In an action upon a policy of insurance against loss by fire, the burden of proof is on the assured to show that the property which is the subject of insurance is of the character described in the policy, and it is competent for the insurer to show that it is of a different character, and therefore not the risk which was insured. *Ibid*.
7. An agent of an insurance company, to whom the company had intrusted blank policies of the Massachusetts standard form, signed by the president and secretary, with authority to countersign and issue such policies, "and by writing indorsed thereon to renew any of such policies, or to vary the risk therein," and providing that all of his powers are to be exercised subject to the rules and regulations of the company, "and, when provision is made therefor in such policy in the manner provided therein," has no authority to give an oral assent to a removal of property insured by a policy containing a condition requiring the written or printed assent of the company to such removal. *Parker v. Rochester German Ins. Co.* 479.
8. In actions upon an alleged oral contract of insurance, it appeared that the plaintiff held a policy of insurance against loss by fire on his property in each of the defendant companies, which expired on a certain Sunday; that A., an insurance agent, was the plaintiff's agent in procuring all his insurance; that B. was the defendants' local agent; and that C. was a clerk in the employ of A., who died before the trial. C. testified that on Saturday B. came into A.'s office and said, "How about those policies which will expire to-morrow of?" the plaintiff? to which A. replied, "Hold them, I want to see" the plaintiff "before they are written up, I think there will be some change in the form"; that B. said, "All right"; that on the next

Monday B. called in A.'s office and said, "How about those policies which I held over Sunday, the" plaintiff's "policies"? to which A. replied, "I have not seen" the plaintiff "yet, I would like to have you hold them until I can see him"; and that B. said that he would. B. testified that on Saturday A. asked him to hold the policies over Sunday until he could see the plaintiff; that on that day B. wrote in his "expiration" book, opposite the two policies, the word "Hold"; and that on Monday A. told him that he had not seen the plaintiff, and did not think he would want the policies, and told him, in so many words, not to renew the policies. Expert testimony was introduced which tended to show that the meaning of the term "Hold" was to keep the policy in force for a reasonable time under the circumstances of the case. Nothing further was said or done as to the renewal of the policies; and on the following Friday the property was destroyed by fire. *Held*, that there was evidence to warrant a verdict for the plaintiff. *Baker v. Commercial Union Assurance Co.* 358.

9. A declaration, describing the contract relied on as an agreement to insure the plaintiff's property against loss by fire for one year from a certain day, which was the date of the expiration of a policy of insurance for one year thereon in the defendant company, is not sustained by proof of an arrangement between the respective agents of the parties, by which the defendant's agent agreed to hold the policy in force until the plaintiff's agent could see the plaintiff and ascertain on what terms he wished to take a new policy, and until one of the parties should terminate the arrangement, or until the arrangement should end by the expiration of a reasonable time. *Ibid.*
10. If the agent of A. and the agent of an insurance company in which A. holds a policy of insurance against loss by fire on his property which is about to expire, enter into an arrangement by which the insurer's agent agrees to hold the policy in force until A.'s agent can see A. and ascertain on what terms he wishes to take a new policy, and until one of the parties shall terminate the arrangement, or until the arrangement shall end by the expiration of a reasonable time, and the property is destroyed by fire within five days, during which nothing further has been said or done as to the renewal of the policy, an action may be maintained by A. against the insurance company to recover for his loss. *Ibid.*
11. The declaration in an action upon a contract of insurance contained five counts, the first and third of which alleged respectively that the defendant agreed to insure the plaintiff's property against loss by fire for one year from a day named, and to issue to the plaintiff, in due course, a policy of insurance in accordance with the contract; and that the defendant insured the plaintiff's property for one year from a day named. The other counts alleged respectively that the defendant agreed to insure the property from a day named until the agreement should be superseded by another agreement, or until a policy should be issued; that the agreement for insurance should continue in force from a day named, until terminated by notice from one party to the other; and that the agreement should remain in force from a day named, for a reasonable time. At the trial, the only contract relied on was an oral one made by the respective agents of the parties.

The defendant requested the judge to rule "that there was no evidence which would warrant the jury in finding a verdict for the plaintiff on the first, second, third, or fourth counts of the declaration, respectively." The judge refused so to rule, and gave full instructions to the jury in regard to the rights and powers of insurance agents to make oral contracts of insurance; and, while he did not in express words say that the jury could not find such a contract as was alleged in the first or third counts of the declaration, the whole tenor of his charge was such that the jury must have understood that they could not find any other valid contract than a temporary contract incidental to the issuing of a policy. *Held*, that the defendant was not injured by the refusal to give in terms the instructions requested. *Baker v. Commercial Union Assurance Co.* 358.

12. The agent of an insurance company has authority to make an oral contract of insurance against loss by fire, which will bind the company until a policy can be issued *Ibid*.
13. An oral contract of insurance against loss by fire, made by the agent of an insurance company until a policy can be issued by the company, is valid when there is no payment or tender of payment of the premium, if the agent chooses to give the insured credit. *Ibid*.
14. If the agent of A. and the agent of an insurance company in which A. holds a policy of insurance against loss by fire on his property, which is about to expire, enter into an arrangement by which the insurer's agent agrees to hold the policy in force temporarily for an indefinite period until there shall be some further communication between them in regard to the matter, it being understood that A.'s agent is to see A. in the mean time, the policy will remain in force, in the absence of any notice by either party to the other, even if the time that was reasonably necessary to enable A.'s agent to see him has elapsed. *Ibid*.

See ACTION, 5; BURDEN OF PROOF, 2, 3; DAMAGES, 4; EVIDENCE, 29, 34; EXCEPTIONS, 7; MASTER AND SERVANT, 7; NEGLIGENCE, 8; VARIANCE, 1.

INTENTION.

See INTOXICATING LIQUORS, 2.

INTEREST.

See NATIONAL BANK, 1.

INTOXICATING LIQUORS.

1. On the trial of a complaint against intoxicating liquors, under Pub. Sta. c. 100, § 30, no judgment of forfeiture can be rendered unless it is proved that the liquors seized, or some part thereof, were owned or kept or deposited by the person charged in the complaint. A judgment in such case, ordering the delivery of the liquors to a claimant who is not named in the

- complaint, settles nothing as to the legality or illegality of such claimant's intention. *Commonwealth v. Reed*, 215.
2. One may be convicted of keeping a tenement used for the illegal sale and keeping of intoxicating liquors, upon proof that he kept the tenement for the purpose of having it used by somebody else for the illegal sale and keeping of liquor, although he did not intend to make any sale himself. *Ibid.*
 3. On a complaint for keeping intoxicating liquors with intent unlawfully to sell the same, the fact that there were in the defendant's carpenter shop certain bottles of lager beer, both full and empty, a jug full of whiskey and another only partly full, a tunnel, a corkscrew, and three bottles all smelling of whiskey, together with the way in which the articles were placed in the shop, is sufficient to justify a verdict of guilty. *Commonwealth v. Martin*, 402.
 4. At the trial of a complaint against an apothecary for unlawfully exposing and keeping intoxicating liquors for sale from May 1 to August 6, 1894, it appeared that the liquors were found in sundry bottles, and that there was also other evidence tending to show that they were kept for unlawful sale. After giving general pertinent instructions not objected to, the judge told the jury that the defendant, as an apothecary, had a right to have intoxicating liquors to be used solely to mix with other ingredients as a medicine, and that, if they should find that they were kept solely for that purpose, they should return a verdict of not guilty, but that if they should find that they were kept for sale they should return a verdict of guilty. There was no evidence which called for any other instructions, the defendant did not testify, there was nothing to show that any part of the liquors were on hand before May 1, as a part of the defendant's stock when he held the license to sell for medicinal and similar purposes; and if they were a part of his former stock, there was nothing to show that he was keeping them at the time of the seizure for any other purpose than either to sell or to mix with other ingredients as a medicine. *Held*, that the defendant's statement to the police officers at the time of the seizure, that part of the liquors were on hand before May 1 as a part of his stock when he held the license to sell for medicinal and similar purposes, was not evidence in his favor, that the instructions were appropriate, and that the judge was not called upon after the close to give, at the request of the defendant, an instruction founded on an hypothesis of fact of which there was no direct evidence, but only a possibility of an inference. *Commonwealth v. Boutwell*, 230.
 5. At the trial of a complaint for bringing intoxicating liquors from the town of A. into the town of B. to be there sold in violation of law, the government introduced evidence tending to prove that the defendant was bringing the intoxicating liquors into B. to a place belonging to a certain person, and that the place was used for the unlawful sale of such liquors. The defendant put in evidence tending to explain the testimony of the government witnesses, and to contradict the inferences to be drawn from it. *Held*, that it was for the jury to say whether they believed the explanation, and that they were not bound to believe it because it was not contradicted

directly, or impeached. *Held, also*, that evidence of the reputation of the place at the time as a place where liquors were sold was admissible as tending to show that the defendant had reasonable cause to believe that the liquors were intended to be sold there contrary to law, the town being one in which licenses were not granted. *Commonwealth v. Loeve*, 518.

See COMPLAINT, 1; EVIDENCE, 38; EXCEPTIONS, 11; TRIAL, 8; VARIANCE, 8.

JUDGE.

See AUDITOR, 2; BREACH OF PROMISE OF MARRIAGE, 4; CONTRACT, 8; EMINENT DOMAIN; EMPLOYERS' LIABILITY ACT, 4; EVIDENCE, 5, 22, 30; EXCEPTIONS, 2, 10, 11, 13, 14; EXPERT, 1; HIGHWAY; INSURANCE, 11; INTOXICATING LIQUORS, 4; MECHANIC'S LIEN, 3; NEGLIGENCE, 8, 11, 17; NEW TRIAL, 4; PROMISSORY NOTE, 3, 4; SAVINGS BANK; TRIAL, 4-10, 12-20; VERDICT.

JUDGMENT.

A judgment by agreement, without a trial, in an action by A. against B. upon a promissory note given in payment for property bought by B. of A., the answer in which alleged that, if B. signed the note, it was obtained by fraud and misrepresentation and without any consideration therefor, and a voluntary payment of the judgment, are not a bar to an action by B. against A. for the breach of a warranty in regard to the condition and quality of the property, although he knew of the breach of the warranty long before he paid the judgment; and the fact that the note contained a stipulation that the title to the property should not pass until the note was fully paid is immaterial in the second action. *Gilmore v. Williams*, 351.

See EXCEPTIONS, 13; FOREIGN JUDGMENT; INTOXICATING LIQUORS, 1; PARTNERSHIP, 3; SUPREME JUDICIAL COURT, 4, 6.

JURISDICTION.

See ADULTERY; EQUITY, 3; FOREIGN JUDGMENT; SUPREME JUDICIAL COURT, 1, 2.

JURY.

See ADULTERY; BENEFICIARY ASSOCIATION, 3, 4; BURDEN OF PROOF, 3; CONTRACT, 1; DECEIT, 2; EVIDENCE, 22, 25, 26, 37; EXCEPTIONS, 4, 6, 8, 10, 14; HIGHWAY, 3; HUSBAND AND WIFE; INTOXICATING LIQUORS, 5; LAW OF THE ROAD: MASTER AND SERVANT, 5, 7; MONEY LENT; NEGLIGENCE, 3, 4, 6, 7, 13, 17, 18, 20, 22; PRINCIPAL AND AGENT, 2; RAPE; SAVINGS BANK, 2; SLANDER; TRIAL, 1-3, 13, 15-20; VARIANCE, 3; WITNESS.

LAND DAMAGES.

See EVIDENCE, 8, 33.

LANDLORD AND TENANT.

See ACTION, 3; LEASE.

LAW AND FACT.

See APPEAL, 2; BENEFICIARY ASSOCIATION, 4; BURDEN OF PROOF, 3; CONTRACT, 7; DECEIT, 2; EVIDENCE, 8, 22, 25; LAW OF THE ROAD; MASTER AND SERVANT, 5; MONEY LENT; NEGLIGENCE, 3, 4, 7, 12, 13, 15, 17, 22; NEW TRIAL, 3; PRINCIPAL AND AGENT; PROMISSORY NOTE, 1, 6; SAVINGS BANK, 2; SLANDER; TRIAL, 4-6, 15, 16; TRUSTEE PROCESS, 2; VARIANCE, 3.

LAW OF THE ROAD.

A person driving is not bound under all circumstances to keep to the right of the centre of the road, or to look behind him, when passing from one side to the other, but if he has reason to believe that a vehicle is behind him, or at his side, it is his duty not to obstruct it, and to use reasonable care in passing from one side of the road to the other not to injure it and its occupants, and in the event of an accident or collision it is for the jury to say whether the circumstances were such that the person driving in advance should, in the exercise of reasonable care, have looked behind or sideways. *Rand v. Syme*, 163.

LEASE.

1. A lease of premises for the term of five years, containing a provision that the "lessee is to have the privilege of renewing this lease upon the same terms for the further term of five years," is "a lease for more than seven years from the making thereof," within the meaning of Pub. Sts. c. 120, § 4, which, if not recorded as therein required, will, so far as it purports to give the lessee the right to a second term of five years, be invalid as against a purchaser of the premises without actual notice of the lease. *Toupin v. Peabody*, 473.
2. A lease of premises for the term of five years contained a provision that the lessee was to have the privilege of renewing the lease upon the same terms for the further term of five years. Before the first term expired the lessor conveyed the premises to a third person. The purchaser knew that the lessee was in possession of the premises as a tenant, but he was informed by the lessor, and believed, that the lessee had no written lease, and it was not until two months after the purchase that he first learned that the lessee had a written lease and was informed of its terms. *Held*,

- upon a bill in equity by the lessee against the purchaser for specific performance of the covenant for renewal in the lease, that the purchaser was not chargeable with actual notice of the lease. *Toupin v. Peabody*, 473.
3. A contract to purchase inserted in the same instrument with a demise may be independent, or may fall with the estate demised, and the usual rules of construction are to be applied in ascertaining the meaning of the whole instrument. *Ober v. Brooks*, 102.
 4. In a lease of certain premises for a term of twenty years from a day named, the lessors agreed to sell and convey, at any time within five years from that date, "to the said lessee or his assigns, upon his or their request, all their (said lessors') present rights, titles, interests, and estates, and all the rights, titles, interests, and estates they may have or can by all reasonable acts and efforts at law or in equity obtain or acquire at the date or time of the conveyance in and to all the aforesaid leased premises, with all the privileges and appurtenances thereto belonging." The lease also provided that in case any portion of the premises was taken for public uses during the continuance of the lease, and before the lessee should exercise his option to purchase, he should have the election to terminate the lease, or to restore the premises, at an expense to the lessor not exceeding the damages awarded for the taking; that the lessors should not be liable for any loss of rent occasioned by such taking; that the damages awarded for such loss of rent should belong to the lessee; and that, if the lessee should terminate the lease "in the manner aforesaid, or otherwise," the right or option to purchase the leased premises should "also be terminated and ended." *Held*, that the lessee's right to purchase was not an independent right, and fell with the lease. *Ibid*.
 5. A lease of premises for a term of years from a certain day, at an annual rent payable monthly, provided that, in case a full and complete delivery of the premises, free and clear of all incumbrances, except certain leases then in force and the rights of any tenant at will, should not be made by the lessor to the lessee on the day so named, no rent should begin to accrue until such delivery should be made. *Held*, that the lessee, having entered and acted under the lease, was bound to pay rent, and could not be heard to say that there were encumbrances other than those excepted in the lease. *Ibid*.
 6. A lease of premises for a term of years from a certain day at an annual rent payable monthly provided that, in case a full and complete delivery of the premises, free and clear of all encumbrances, except certain leases then in force and the rights of any tenant at will, should not be made by the lessor to the lessee on the day so named, no rent should begin to accrue until such delivery should be made. When the lease was delivered the premises were subject to mortgages, which were discharged afterwards with the proceeds of another mortgage executed and delivered on the day of such discharge, and expressly made subject to the lease, under which possession had not then been taken. *Held*, that the later mortgage was not such an encumbrance as was contemplated in the provision of the lease. *Ibid*.
 7. At the trial of an action for damages caused by the destruction of build-

ings by fire communicated by the locomotive engines of the defendant railroad, it appeared that the plaintiff was lessee under a lease for ten years, which when admitted in evidence had not been recorded, but was recorded during the arguments. At the time of the fire there remained of the term nearly eighteen months, and the defendant contended that the lease was not evidence of any title in the plaintiff as against the defendant, because, being unrecorded, it was void under Pub. Sta. c. 120, § 4. The plaintiffs were in actual possession under the lease at the time of the fire. *Held*, that if the lease was recorded before the trial was finished, or perhaps even before judgment was rendered, and there was no intervening title of record, the defendant was protected, and, if the rule of evidence relative to the recording of deeds was applicable, it was satisfied by recording the lease during the arguments. *Anthony v. New York, Providence, & Boston Railroad*, 60.

8. The plaintiff, under a written lease, hired certain articles of furniture of the defendant, for which he paid as rent the sum of five dollars, and promised to pay the further sum of one dollar a week until he should have paid a specified amount, when the rent was to cease, and the articles were to become his property. The lease provided that, upon any default in the payment of rent, the defendant or his agents might, "without demand or notice, or being deemed guilty of any trespass or tort, and without thereby rendering themselves liable to refund any sums received by them as rent aforesaid, enter any house or place where said articles may be, and take possession of and remove said articles therefrom." It further stipulated that, so long as rent should be payable, the plaintiff would not remove the furniture from the premises described in the lease. *Held*, that the right of the defendant to enter and remove the furniture, which was an irrevocable license, was given only upon a failure to pay rent, and not upon a removal of the furniture, and that there was nothing in the contract which gave to the defendant the right, upon the removal of the furniture by the plaintiff during the continuance of the lease, to demand a settlement of the entire account if the rent was paid as agreed. *Lambert v. Robinson*, 34.

See ASSAULT, 2, 3; DAMAGES, 4; EVIDENCE, 29.

LEGACY.

See CONSTITUTIONAL LAW, 2; DEVISE AND LEGACY.

LEGISLATURE.

See CONSTITUTIONAL LAW.

LETTERS PATENT.

See CONTRACT, 9.

LICENSE.

See ASSAULT, 2, 3; INFANT, 2; LEASE, 8; NEGLIGENCE, 5.

LIEN.

See MECHANIC'S LIEN.

LIFE ESTATE.

See DEVISE AND LEGACY, 4-6; TRUSTEE PROCESS, 4.

LIFE INSURANCE.

See ACTION, 5; INSURANCE, 1.

LIMITATIONS, STATUTE OF.

1. A husband's cause of action for the alienation of his wife's affection accrues at the time when he discovers her in the act of adultery; and an action therefor against her paramour, brought more than six years after such discovery, is barred by the statute of limitations, Pub. Sts. c. 197, § 1, cl. 4. *Sanborn v. Gale*, 412.
2. The fact that a wife, although detected by her husband in the act of adultery, denied, by agreement with her paramour, their guilty relations until the expiration of twelve years, when she confessed them, is not a fraudulent concealment of the husband's cause of action for the alienation of his wife's affection, within Pub. Sts. c. 197, § 14. *Ibid.*
3. A cause of action cannot be said to be concealed from one who has a personal knowledge of the facts which create it, although he may have no other means of establishing his case than by his own testimony. *Ibid.*

MALICE.

See SLANDER.

MALICIOUS PROSECUTION.

An action for malicious prosecution will not lie against the guardian of an insane person for making complaint against the plaintiff for entering the dwelling-house of the ward after having been forbidden by the guardian so to do. *Gray v. Parke*, 582.

MANSLAUGHTER.

See TRIAL, 3.

MARRIAGE.

See BREACH OF PROMISE OF MARRIAGE; DEVISE AND LEGACY, 7.

MASTER AND SERVANT.

1. One entering the employ of another assumes the obvious risks arising from the nature of the employment, from the manner in which the business is carried on, and from the condition of the ways, works, and machinery, if he is of sufficient capacity to understand and appreciate them. *Goodes v. Boston & Albany Railroad*, 287.
2. At the trial of an action against a railroad corporation for causing the death of the plaintiff's intestate, who was in its employ as a brakeman, it appeared that, in the night time, while engaged in the performance of his duties, he struck against a switch-stand, which stood close to the track, and was knocked from the car, receiving injuries which resulted in his death; that at the time of the accident he had been in the defendant's employ nearly three months; that before entering the defendant's employ he had worked several months on another railroad as a brakeman; that he was strong, active, healthy, of good eyesight and hearing, knew his business, and was competent and intelligent; that in the course of his employment he had been frequently by day and by night over and by the switch where he was knocked off; that the switch was in the same place and was the same in all respects as when he entered the defendant's employ; and that there had been no change in the adjacent tracks. *Held*, that he had assumed the risk of injury from the proximity of the switch to the track; and that the action could not be maintained. *Ibid*.
3. If a person while in the employ of another is injured by an accident which happens in the ordinary course of his employment, and while he is engaged in the performance of duties to which he is accustomed and under circumstances which are not unusual, in an action for the injury the case does not call for instructions on the question whether the emergency was such that he could fairly be said to have voluntarily assumed the risk of the injury. *Ibid*.
4. An act done by a servant while engaged in his master's work, but not done as a means or for the purpose of performing that work, is not to be deemed the act of the master; and a person who is injured by such act, even if a negligent one, cannot recover damages of the master therefor. *Bowler v. O'Connell*, 319.
5. In an action for personal injuries occasioned to the plaintiff, a boy between fourteen and fifteen years of age, while in the defendant's employ by using a steam punching-machine, there was contradiction in the testimony in regard to the instructions given to the plaintiff as to the avoidance of danger in using the machine. *Held*, that, if the jury believed the plaintiff, they might well find that there was negligence on the part of the defendant, and that it was also a question of fact for the jury, whether the plaintiff, in view of his youth and inexperience, was in the exercise of due care. *Armstrong v. Forg*, 544.

6. If, in an action for personal injuries, it may be assumed in favor of the plaintiff, a boy thirteen years old, without deciding the point, that the risk of particular dangers from the negligence of fellow servants may sometimes be so great and so obvious to the employer that he ought to give an inexperienced boy warning and instruction in regard to them, he is called upon so to do only when he himself ought reasonably to appreciate them, and when his instruction would be likely materially to diminish the danger to his employee; and there is no evidence to warrant a finding that he owed the plaintiff such a duty, if the danger of injury was remote and improbable, and nothing which the plaintiff could have done consistently with the expeditious transaction of the work could have relieved him from the possibility of the accident. *Siddall v. Pacific Mills*, 378.
 7. In an action for personal injuries occasioned to the plaintiff, while in the defendant's employ, by the alleged defective condition of a machine upon which he was working, the fact, as appears from the defendant's testimony, that he was insured against accidents, is not a subject for a legitimate argument by the plaintiff to the jury. *Tremblay v. Harnden*, 383.
- See EMPLOYERS' LIABILITY ACT; EVIDENCE, 11-13, 27, 28, 31; EXCEPTIONS, 7; NEGLIGENCE, 7-11, 16-22; PASSENGER.

MASTER IN CHANCERY.

See EQUITY, 5.

MECHANIC'S LIEN.

1. It is no defence to a petition to enforce a mechanic's lien, under Pub. Sts. c. 191, for labor performed for a contractor upon the respondent's house, that the material furnished by the contractor was not of the quality called for by the contract, and the petitioner's work, through no fault of his, was a damage to the house. *Bowen v. Phinney*, 593.
2. Section 8 of Pub. Sts. c. 191, which provides in the case of liens on buildings and land that certain inaccuracies in the statement to be filed in the registry of deeds under § 6 of the statute shall not invalidate the lien unless the person filing it has wilfully and knowingly claimed more than is his due, is not repealed by the St. of 1892, c. 191, which amends said § 6 to the effect that no statement required by it shall be invalid for certain inaccuracies provided there was no intention to mislead and the parties entitled to notice were not in fact misled thereby. *Walls v. Ducharme*, 432.
3. If, at the trial without a jury of a petition to establish a mechanic's lien, there is evidence of overcharges for labor in the statement filed in the registry of deeds, and also evidence in explanation of such overcharges, it is for the judge to say whether, on all the evidence, the improper charges were made ignorantly, or whether the petitioner wilfully and knowingly claimed more than his due; and the appearance and manner of the petitioner in testifying may be taken into account. *Ibid.*

MILL.

See EMINENT DOMAIN; EVIDENCE, 9.

MINOR.

See INFANT.

MISTAKE.

See EXECUTOR, 2.

MONEY LENT.

In an action for money lent, the plaintiff's evidence tended to show that he gave the defendant a bank check for the sum claimed to enable the latter to pay for land which he had bought; and the defendant's evidence tended to show that the plaintiff owed him the whole amount of the check for advances made by him to the plaintiff at different times. There was also evidence tending to show that in proceedings brought in another court the defendant had testified that, at a date later than that of the last alleged advance to the plaintiff, the latter did not owe him anything; that the defendant used the money obtained by him upon the check in payment for land which he had bought; and that the plaintiff expected when he gave the check to have an interest in the land. *Held*, that the case was for the jury upon all the evidence. *Goss v. Calkins*, 492.

See EVIDENCE, 42.

MORTGAGE.

1. One who purchases from the mortgagee a mortgage which the latter has previously sold and transferred to another by an assignment duly recorded takes with constructive notice of want of title in his vendor; and although the mortgage and mortgage note are in the possession of his vendor, and are delivered with the assignment, the second purchaser takes no better title than that of his vendor, and must re-assign and deliver up the note and mortgage to their true owner. *Murphy v. Barnard*, 72.
2. A mortgagor who, relying merely upon his own supposition that the mortgage is still owned by the mortgagee, who has in fact sold it and has no authority from its owner to collect the principal, after the note has become overdue and without the production of the note, makes payments of principal to the mortgagee, is not protected as against the owner of the note by the fact that at the time of payment the mortgage note is in the possession of the mortgagee in his office in another city. *Ibid*.

See CONTRACT, 1; DEVISE AND LEGACY, 1; LEASE, 6.

MOTIONS.

See APPEAL; AUDITOR, 1; EXCEPTIONS, 13; INDICTMENT, 1; POOR DEBTOR, 4-6; VERDICT, 1.

MUNICIPAL CORPORATION.

See CITY; TOWN.

MUNICIPAL COURT.

See APPEAL, 1; CONVICTION.

MURDER.

See EVIDENCE, 3; INDICTMENT, 2-4.

NAME.

See VARIANCE, 8.

NATIONAL BANK.

1. If the cashier of a national bank, assuming to act in its behalf, receives at the bank money left with him as and for a deposit in the bank, the fact that, at the time of receiving it, he agrees that the bank shall at some time in the future invest the money in stocks and bonds for the depositor, and meanwhile shall allow him interest upon it, does not have the effect to exonerate the bank from its liability to refund the money without interest to the depositor on demand, no investment thereof having been made, even if such agreement by the cashier was invalid, and the money did not actually come to the use of the bank, but was misappropriated by the cashier. *L'Herbette v. Pittsfield National Bank*, 137.
2. At the trial of an action against a national bank for money deposited at the bank with its cashier, upon the agreement that the money should be invested by the bank in stocks and bonds, no exception lies to an instruction to the jury that, "if the directors" of the bank, "through inattention or otherwise, suffered the cashier to pursue and practise a certain line of conduct for a considerable period of time without objection, the bank will be bound by his acts within that line of conduct." *Ibid*.

See EVIDENCE, 14-19.

NEGLIGENCE.

1. If a person builds and maintains upon his premises a chimney so that, if it falls, it will fall upon and injure the adjoining premises, he is bound, in the exercise of proper care, to construct it so that it will withstand any

gales which experience shows are reasonably to be anticipated in that locality, and he is liable for injuries caused by the neglect of his obligation in this respect; and the facts that he had the chimney examined by an experienced mason, who pronounced it safe, and relied upon his opinion, constitute no defence. *Cork v. Blossom*, 330.

2. If, in an action against a city for personal injuries occasioned to the plaintiff by falling into a trench alleged to have been negligently made and maintained by the defendant's servants, all the circumstances of the case show that the plaintiff thoroughly understood the risk he was running which led to the accident, he was not in the exercise of due care and a verdict is properly ordered for the defendant. *Casey v. Fitchburg*, 321.
3. A man sixty years old was walking with a companion along the sidewalk of a street in a city in the evening, and, there being a crowd in front of him, started with his companion to cross the street, though not at a regular crossing. As he stepped off the curbstone his foot caught on a pile of rails, which had been placed in the gutter next to the curbstone by a street railway company, and he fell over them and was injured. He did not look to see if there was anything before him, and he did not see the rails until he fell. The rails could not be seen easily, the branches of trees cutting off an electric light which hung not very far away. *Held*, in an action against the city for his injury, that the question whether he was in the exercise of due care was properly left to the jury. *Slee v. Lawrence*, 405.
4. In an action against a town for personal injuries occasioned to the plaintiff by falling, after dark on a snowy night, upon a hump of ice on the sidewalk of a frequented street which is constructed under a railroad bridge, having an entrance therefrom to a passenger station above, although he knew of the existence of the ice, having noticed it earlier in the day, and was not thinking of it at the time when he fell, if he testifies that he was going cautiously because it was slippery, and that he went along as cautiously as he could, and it appears that the sidewalk was in common use, and that another person was using it at the time of the accident, the question whether the plaintiff was exercising due care is for the jury. *Coffin v. Palmer*, 192.
5. The wife of the janitor of an apartment house or hotel, for the purpose of showing a new tenant where to hang clothes, went, at the request of her husband, to the roof of the hotel by the stairway. In returning she used a freight elevator, which she entered by stepping over a rail or bar placed across the entrance to the elevator about eighteen inches from the floor and locked. She chose that method of descent for her own convenience. She was not shown to have any knowledge of a rule forbidding the riding on the elevator, and she had seen others riding on it without objection from the superintendent of the building. *Held*, in an action against the owner of the hotel for damages for injuries sustained by reason of the alleged defective condition of the elevator, that the plaintiff was a volunteer, using the elevator without authority or license from the defendant, for the purpose of assisting her husband, and that the defendant owed no duty to her to see that the elevator was in a safe condition, but only the duty to abstain from wilful injury to her. *Billous v. Moors*, 42.

6. A jury may find negligence from the breaking of a gas-pipe and the consequent escape of gas, but it is for them to say whether they will do so, and, if there are other circumstance in the case bearing on the question, they must weigh them all. *Carmody v. Boston Gas Light Co.* 539.
7. In an action for personal injuries occasioned to the plaintiff, while in the defendant's employ as an assembler of revolvers, by the explosion of a cartridge which had been accidentally left in one of the chambers of a revolver by the defendant, whose business it was to test the revolvers after the plaintiff had put them together, and, if they did not work well, to return them to him, and who told the plaintiff, when he first went to work, that he would see that no unexploded cartridge was left in the revolvers, it cannot be said, as matter of law, that the plaintiff should have examined the chambers of the revolver to see whether they contained an unexploded cartridge; or that, by continuing in the defendant's employ after finding, on a former occasion, an unexploded cartridge in a revolver returned to him by the defendant after testing it, he assumed the risk of an accident from such a cause; or that the manner in which the accident occurred showed that the plaintiff was careless; or that he should have used the safety catch on the revolver, the use of which would have prevented the accident; but all of these questions are for the jury. *Anderson v. Duckworth*, 251.
8. In an action for personal injuries occasioned to the plaintiff while in the defendant's employ, it is competent for the judge, in the exercise of his discretion, to admit in evidence the whole of a conversation offered by the plaintiff for the purpose of showing an admission of liability on the part of the defendant, and in which reference was made by him to the fact that he was insured against accidents, with a caution to the jury that the fact of insurance is not to be taken as an admission by the defendant, and then in the charge, after saying again that the insurance is not to be regarded as an admission, to leave it to the jury to find, under suitable instructions, what the true import of the conversation was. *Ibid.*
9. The plaintiff, in an action for personal injuries, who was a boy seventeen years old, was sawing boxwood logs into blocks about one inch and a quarter thick, and some of the logs were so large that the saw would not entirely sever them; these logs he took from the table by moving them transversely upon it behind the saw until he could bring them forward, when with a hatchet he detached the partially severed block; a log which he was thus manipulating behind the saw touched it, and was thrown suddenly forward, carrying his hand, which fell upon the saw, and he received the injuries complained of. The evidence tended to show that he had had but little experience in cutting the blocks; and that this method was approved by his foreman. Held, that it could not be said, as matter of law, that in using this method the plaintiff was not in the exercise of due care. *Hanson v. Ludlow Manuf. Co.* 187.
10. While the general danger of contact with a circular saw in operation is obvious, the particular danger arising from the liability of the saw suddenly and forcibly to so throw upward and forward objects which touch it in the rear that they may fall upon the front of the saw is an obscure danger,

of which it is the duty of a master to give warning if he has reason to suppose that a servant set at work upon such a saw is ignorant of it; and in an action for personal injuries caused by such movement of the saw it may be a question for the jury whether the servant was so ignorant of this danger that the master ought to have warned him of it. *Hanson v. Ludlow Manuf. Co.* 187.

11. In an action for personal injuries occasioned to the plaintiff while in the defendant's employ by the falling on him of shafting and pulleys fastened to beams overhead in the defendant's factory, the judge refused to instruct the jury, as requested by the defendant, that "No burden rests on the defendant to show or explain the cause of the accident," and instructed them that the burden was on the plaintiff throughout; that under some circumstances the plaintiff's injury, especially where the means of explanation were more likely to be within the control of the defendant than of the plaintiff, was itself evidence of negligence; that the breaking of the machinery in connection with a failure of one who presumably can explain to give explanation might be evidence of want of care in providing it, but this principle had no application to the case; and that the injury, though caused by the breaking of the machinery, was not in itself evidence that the defendant was wanting in due care to provide a reasonably safe place for the plaintiff to work in. The defendant further asked the judge to instruct the jury, "The measure of the defendant's duty was to exercise due care in providing instrumentalities for the plaintiff to use, and in providing a safe place in which the plaintiff was to work, and *prima facie* it is presumed to have done so." The judge gave the first portion, including the word "work," but declined to give the rest, and instructed them: "Negligence on the part of the defendant must be proved. It cannot be presumed. It is so far a presumption that the defendant discharged its whole duty, that, until it is proved otherwise, it is to be taken that it did so." *Held*, that the defendant had no ground of exception. *Ouillette v. Overman Wheel Co.* 305.
12. If, at the trial of an action for damages for the loss of life of the plaintiff's testator by being struck by the defendant's train at the crossing of a highway by the defendant's railroad, it appears that there were circumstances from which the jury might have found that the testator was negligent in not waiting longer before starting after a freight train had passed, so that he could more effectually use his ears in a place where his eyes could not avail him, and that, on the other hand, there was much to excuse, if not justify, his conduct, the court cannot say, as matter of law, that he was negligent, but it is for the jury to determine whether he was in the exercise of reasonable care. *Hubbard v. Boston & Albany Railroad*, 132.
13. In order to find negligence on the part of a railroad corporation in not taking other precautions at crossings than sounding the whistle and ringing the bell, as required by statute, to warn travellers of the approach of trains, there must be evidence beyond the fact that there is a public way crossed by a railroad at grade; and where in an action for damages for the loss of life of the plaintiff's testator by being struck by the defendant's train at the crossing, the bill of exceptions disclosed nothing in regard to the

- amount of travel on the highway, which, on account of the location of the crossing and its surroundings, was the question which would determine whether extra precautions were necessary or not, and it appeared that the crossing was within a few feet of the railroad station, and the jury, in the view which they took, had an opportunity of judging from the appearance of the road and of the adjacent country how much the road was travelled, it cannot be said, as matter of law, that they erred in finding a gate or flagman necessary. *Hubbard v. Boston & Albany Railroad*, 132.
14. *It seems*, that, if a passenger on a railroad train, which has stopped at a dimly lighted station in the evening, steps from the platform of a car to descend to the platform of the station after the train has actually started, but he does not know, and by the exercise of ordinary care and prudence cannot know, that it has started, and is injured, the fact that the train had so started would not of itself prevent the maintenance of an action for his injuries. *Merritt v. New York, New Haven, & Hartford Railroad*, 326.
15. A., who was a passenger on a railroad train, was taken ill during his journey, and received some attention from the train hands. When the train reached the station which was the end of its route, the engine stopped at the water standard, which was at the north end of the station platform, leaving the cars alongside of the platform, and all the passengers alighted. The train stopped about two minutes, and then went on to the north for a short distance in order to be switched back upon another track. Nobody saw A. leave the car, and the next that was seen of him he was lying beside the track about thirty-five or forty feet north of the water standard, and some one was then assisting him to his feet. He was much injured, and died about six hours later. His administrator brought an action against the railroad corporation for causing his death; and the judge, who tried the case without a jury, found for the defendant. *Held*, that it could not be said, as matter of law, that the finding was wrong. *Brady v. Old Colony Railroad*, 408.
16. If, in an action for personal injuries occasioned to the plaintiff while in the employ of a railroad corporation, there is no sufficient evidence that the defendant had failed to make proper provision for the inspection of its cars, but it appears that the neglect, if any, was that of a fellow servant, the plaintiff cannot recover under a common law count in his declaration which alleges the duty of inspection on the part of the defendant, and injury to the plaintiff in consequence of its failure to inspect. *Bowers v. Connecticut River Railroad*, 312.
17. In an action for personal injuries occasioned to the plaintiff, while in the employ of a railroad corporation coupling cars, by reason of defective drawbars which had not been discovered or remedied owing to the negligence of a person in the service of the defendant intrusted with the duty of seeing that the cars were in proper condition, there was evidence that there was an opportunity for too much lateral motion of the drawbars, and especially of the drawbar on the stationary car, and also that the failure to discover or remedy the alleged defect was negligence on the part of the defendant's inspectors of cars. *Held*, that the judge erred in directing a verdict for the defendant, and that the case should have been submitted to the jury. *Ibid.*

18. If, in an action for personal injuries occasioned to the plaintiff while in the employ of a railroad corporation, a count in the declaration alleges that the accident was due to a defective condition which had not been remedied or discovered owing to the negligence of the defendant or of some person in its employ intrusted with and exercising superintendence, or whose sole or principal duty was that of superintendence, there is no case for the jury if there is no evidence of negligence on the part of any superintendent or person exercising superintendence for the defendant. *Bowers v. Connecticut River Railroad*, 812.
19. A., who was employed by a railroad corporation as a freight handler, was told to go with B., another employee, on to one of the railroad piers and get a barrel of goods. Instead of following B., he walked along a narrow passageway between a railroad track and a cotton platform, the distance between the rail and the platform being three and a half feet throughout its length, which was not designed to be used in this way, although it was sometimes so used. There was a safer, though longer, way provided, which B. took. A., without looking to see whether a locomotive engine was coming, proceeded along the shorter way, and was struck by an engine while standing with his back to the platform and his truck held in front of him, and was injured. He was familiar with the premises, having worked there a year or more. There were several tracks on the pier, the engine was going up and down the tracks all day long, and the time of the accident was "just the busy time." Held, in an action against the corporation for his injuries, that A. was not in the exercise of due care; and that the action could not be maintained. *Galvin v. Old Colony Railroad*, 538.
20. It seems, that a jury would not be warranted in finding negligence on the part of the engineer of an engine running back and forth on the tracks of a railroad pier, in not sounding the whistle or ringing the bell to warn an employee of the railroad corporation who is familiar with the premises, and who is walking along a narrow passageway not intended for use though sometimes used, at the side of a track and between it and a platform used for freight, in the performance of his work as a freight handler; it not being customary to give such warning, the employees being accustomed to look out for themselves. *Ibid.*
21. When a railroad freight train, consisting of two engines, twenty-two cars, and a caboose, reached a certain station in the night-time, a brakeman, whose position was on the forward part of the train, was sent forward by the conductor with orders for the engineers. As the train went on towards the next station it broke apart, leaving a portion of the cars attached to the engines, and the other cars and the caboose separated therefrom. After the train had passed this station, the brakeman, who was on the last engine looking out, said that he could not see the red light on the rear of the train, and then started back with his lantern along the top of the moving train to see if it had broken apart. The night was very dark and foggy. He was not seen alive after that, but his dead body was found in the centre of the track between the rails; and there were indications that he struck on his feet between the tracks and was run over by that part of the train which was detached from the engines. Held, in an action against the rail-

road corporation for causing his death, that there was no evidence of due care on his part, and that the action could not be maintained. *Geyette v. Fitchburg Railroad*, 549.

22. In an action against a railroad corporation for personal injuries occasioned to the plaintiff while in its employ, it appeared that he was tripped by a wire, which was used as a part of the electric signal system of the railroad to connect the joints of the rails, and which projected above the rail, and was run over by a train while, in the course of his employment, crossing the tracks upon which trains were passing in opposite directions. The evidence was conflicting as to the nature of his employment, his evidence tending to show that he was employed as a brakeman during a portion of the day, and that at other times he assisted in repairing the electrical apparatus; and the defendant's evidence tending to show that he had charge of its electric system. The evidence was conflicting also upon the question whether it was necessary for him to use the tracks as he did, and upon other questions. *Held*, that it was error to rule, as matter of law, that the action could not be maintained; and that the case should have been submitted to the jury. *Brouillette v. Connecticut River Railroad*, 198.

See ACTION, 3; CONTRACT, 11; DECREE; EMPLOYERS' LIABILITY ACT; EVIDENCE, 2, 11-13, 26-31, 37, 39; EXCEPTIONS, 7; HIGHWAY, 3; HUSBAND AND WIFE; INFANT, 1; MASTER AND SERVANT; NOTICE; PASSENGER; PRINCIPAL AND AGENT, 3; TRIAL, 17-19.

NEGOTIABLE INSTRUMENTS.

See EVIDENCE, 14; PROMISSORY NOTE; VARIANCE, 2.

NEW TRIAL.

1. After a verdict for the defendant a new trial of an action against a railroad corporation, for causing the death of the plaintiff's intestate, cannot be granted, unless this court can see that the plaintiff sustained the burden of proof resting upon him to show a want of due care on the part of the defendant, by evidence which the judge, who tried the case without a jury and found for the defendant, was legally bound to accept as conclusive. *Brady v. Old Colony Railroad*, 408.
2. If, at the trial of an indictment for threatening to accuse a person of crime with the intent to extort money, letters which were written more than six months before the acts which were the subject of the indictment, and which relate to other persons and have no tendency to prove a criminal intent, are admitted in evidence, a new trial will be granted, although the other evidence may have been sufficient to warrant the conviction of the defendant. *Commonwealth v. White*, 403.
3. A new trial will not ordinarily be granted on the ground of newly discovered evidence which goes only to impeach the credit of a witness at the trial; and where affidavits are offered for the purpose of showing a conspiracy between the plaintiff and a witness for him to testify falsely, the

question of conspiracy is one of fact for the court. *Hopcraft v. Kütredge*, 1.

4. On a motion for a new trial, a paper alleged to be a copy of an affidavit of a witness at the trial, which does not purport to have been signed or sworn to by him, may properly be rejected, and it is within the discretion of the judge to reject an affidavit as filed too late, and to refuse to allow a motion for a new trial to be amended so as to include the affidavit, and his discretion is not reviewable in this court, the circumstances not being fully disclosed. *Ibid*.
5. On a motion for a new trial, an interrogatory to a deponent, as to whether certain statements in an affidavit of a person taken in the case were true, is properly excluded, and requests resting on the interrogatory and the excluded affidavit are rightly refused. *Ibid*.
6. Where a new trial was granted on account of the exclusion of an interrogatory to an expert, the court said that it was not necessary to consider whether an interrogatory to another expert, which had also been excluded, was admissible at the stage of the examination at which it was put, even if it would have been admissible earlier, upon which it expressed no opinion, and that at the new trial it might become immaterial, or might arise under different circumstances. *Ouillette v. Overman Wheel Co.* 305.

NOTICE.

1. A notice to a town that a person has been injured by a defect in the sidewalk of a street at a point "just northerly of the northerly side of the entrance to the passenger station" of a railroad company, sufficiently designates the place of the injury, under Pub. Sts. c. 52, § 19, if, in an action for such injury, it appears that the sidewalk was constructed on the easterly side of the street under a railroad bridge, through the easterly abutment of which an entrance led up to a station above, and the evidence tends to show that the injury occurred a little way from the entrance, and not more than fifteen or twenty feet northerly of it. *Coffin v. Palmer*, 192.
 2. A notice to a town stated that a person was injured by falling "over the root of a tree on the sidewalk of Central Park Avenue." The accident in fact occurred on Hyde Park Avenue at a point near the junction of those ways. *Held*, that, in the absence of an intention to mislead, the notice, though meagre as to the statement of the place of the injury, was not so defective as to render it invalid. *Fuller v. Hyde Park*, 51.
- See EMPLOYERS' LIABILITY ACT, 3; EVIDENCE, 37; EXCEPTIONS, 1; INFANT, 2; LEASE, 1, 2, 7; MASTER AND SERVANT, 6; MORTGAGE, 1; NEGLIGENCE, 10, 20; OLEOMARGARINE; POOR DEBTOR, 8; PROMISSORY NOTE, 1, 2.

NUISANCE.

See EVIDENCE, 2; FENCE.

OATH.

See POOR DEBTOR, 1, 4-7; TRUSTEE PROCESS, 3.

OFFICER.

See CITY, 4.

OLEOMARGARINE.

1. The St. 1891, c. 58, § 1, entitled "An Act to prevent deception in the manufacture and sale of imitation butter," forbids the exposing for sale of oleomargarine colored to look like butter, and it is immaterial whether the particular purchaser was advised of its real character or not. *Commonwealth v. Russell*, 520.
2. The St. 1891, c. 412, § 4, was not intended to draw fine distinctions between different kinds of oleomargarine, all of which would resemble butter; but it requires that every one who delivers oleomargarine, of whatever sort, from a vehicle upon the public streets, shall carry along with him upon his vehicle a public notice that he is licensed to sell oleomargarine. *Commonwealth v. Crane*, 506.

OPTION.

See LEASE, 2.

ORDINANCE.

See CITY; COMPLAINT, 2; TOWN.

PARENT AND CHILD.

1. A man is not bound to maintain the children of his wife by a former marriage, but, if he chooses to receive them into his family and to assume the relation of a parent to them in their daily life, the law will not imply a contract on his part to pay them for services which they render him while members of his family, nor a contract on their part to pay him for their maintenance. *Livingston v. Hammond*, 375.
2. In an action, upon an account annexed, by a step-father for necessities alleged to have been furnished to his step-son during the latter's minority, it appeared that, as an act of charity, the plaintiff had paid the rent of a house for the defendant's mother and her children for several months before his marriage to her; that after the marriage he and she and her children lived together as one family for nearly seven years; that so long as his business was prosperous, he supported them liberally, "treating the children as he would had they been his own, furnishing them spending money, and providing for them as a liberal father in his circumstances

would provide for his own sons"; that for nearly three years of the time covered by the account annexed the defendant was earning small sums of money, all of which were paid to his mother and used for the support of the family; that during all the time covered by this account the defendant's brother was in like manner earning money and paying it to his mother for the same purpose, and the plaintiff's earnings, after he ceased to be prosperous, were contributed to the common fund and put to the same use; that the defendant's mother also earned some money, and her relatives made contributions for the support of the family; and that no accounts were kept of the amounts received from these different sources. *Held*, that these facts warranted a finding for the defendant. *Livingston v. Hammond*, 375.

3. *It seems*, that a step-father, by his conduct in procuring the preparation and allowance of a probate account in which his step-son is held liable for his maintenance while a member of his step-father's family to his mother as guardian, and by the step-son's action in settling this claim, is estopped from recovering against the step-son for the latter's maintenance during the time covered by the probate account. *Ibid*.

See INFANT, 2.

PARTIES.

See ACTION, 5; PARTNERSHIP, 3.

PARTITION.

1. Under Pub. Sts. c. 178, § 65, providing that "In any case of partition the court may, at the time of appointing commissioners, or subsequently by agreement of parties or after such notice to all persons interested as may be required, order the commissioners to make sale and conveyance of the whole or any part of the lands that cannot be advantageously divided, upon such terms and conditions and with such securities for the proceeds of such sale as the court may direct, and to distribute and pay over the proceeds of the sale in such manner as to make the partition just and equal," a sale may be ordered by the court after the commissioners have made their report. *Ramsey v. Humphrey*, 385.
2. Upon an appeal from a decree of the Probate Court, on a petition for partition of land held by tenants in common, ordering a sale of the land after the commissioners had made their report, it appeared that the parties were in dispute in regard to the value of the property; that the report of the commissioners setting it off to one of the parties at an appraisal was agreed to by only a majority of the board; and that the principal fact in controversy before the court was one which rested largely upon the opinion of witnesses. *Held*, that the report of the commissioners should be set aside, and the decree for a sale affirmed. *Ibid*.

PARTNERSHIP.

1. An agreement in writing, under seal, was signed by A. in the name of a firm composed of A. and B., and by its terms the firm agreed, in consideration of C.'s advancing a certain sum of money to D. and accepting from D. his promissory note and shares of a certain corporation as collateral security therefor, if the note was not paid at maturity, to purchase of C. the shares or as many of them as should amount to the sum then due on the note, at a stated price per share. In an action by C. upon the agreement, it appeared that the partnership of A. and B. was doing a brokerage business, "dealing in bonds and investments of that character, and in the promotion of new companies." There was no evidence that a transaction like the one set out in the agreement was within the scope of the partnership business, or was a usual one with firms doing a similar business; nor was there any evidence of any assent or of subsequent ratification of the agreement on the part of B., who testified that he had no knowledge of the transaction until after the suit was brought. *Held*, that there was no evidence to warrant a finding against B. *Taft v. Church*, 527.
2. If one of two partners, without the knowledge or consent of the other, executes a contract which is outside the scope of the partnership business, he may be bound, although the other is not. *Ibid*.
3. In an action against two persons as partners, if one only is held liable, judgment may be entered against him alone, under Pub. Sts. c. 171, § 5, and no amendment of the declaration is necessary. *Ibid*.

See EVIDENCE, 21; PRINCIPAL AND AGENT, 1.

PARTY WALL.

An addition to a party wall made by one of two adjoining owners of land entirely on his own land, for the purpose of strengthening and thickening the wall and foundation so as to support a higher building, does not become a part of the party wall, and the other adjoining owner who subsequently uses the wall as strengthened in increasing the height of his building, but who does not project his timbers beyond that portion of the wall standing on his land, though liable under his deed to pay for the half of the original division wall erected on his land, cannot be restrained from making such use of the addition, or made liable for a portion of its cost. *Walker v. Stetson*, 86.

PASSENGER.

1. An employee of a railroad company was furnished by it each month with a ticket which contained more rides than were necessary in travelling to and from his work, and on which he was at liberty to ride whether in the service of the company or on his own private interests or pleasure. On the back of the ticket was a contract, one clause of which was as follows: "The person accepting this free ticket thereby and in consideration thereof assumes all risk of accidents, and expressly agrees that the company is not

a common carrier in respect to him, and shall not be liable under any circumstances, whether of negligence of its agents or otherwise, for injury to the person, or for loss or injury to the property, of the passenger using this ticket." While travelling on the ticket, on his own personal business, when his time was his own, he was killed in a collision caused by the gross negligence of an engineer in the employ of the company. *Held*, in an action by his administrator for damages under Pub. Sts. c. 112, § 212, that at the time of the injuries the plaintiff's intestate was not in the employment of the defendant within the meaning of the statute; that he was a passenger; and that the contract on the back of the ticket, in considering which the fact that the statute was a penal one was to be borne in mind, did not operate to release the defendant from liability. *Doyle v. Fitchburg Railroad*, 66.

2. A person may at one time be an employee when passing over a railroad, and at another time in passing over the same road be a passenger, though continuing all the while in a popular sense in the employment of the railroad company. *Ibid*.

See NEGLIGENCE, 14, 15.

PATENT.

See CONTRACT, 9.

PAYMENT.

See ACTION, 5; CONTRACT, 6-8, 10, 11; JUDGMENT; MORTGAGE, 2; TAX, 2.

PENALTY.

See TOWN.

PERJURY.

Where a wife at the trial of a criminal case is a witness under the Pub. Sts. c. 169, § 18, for her husband, who is present in the prisoner's dock, and she commits perjury, there is no presumption that her testimony was given under the coercion of her husband, and she is not exempt from the penalties imposed for the offence. *Commonwealth v. Moore*, 441.

PERSONAL PROPERTY.

See ASSAULT, 3; DAMAGES, 4; LEASE, 8.

PHOTOGRAPH.

See EVIDENCE, 3, 4.

PHYSICIAN.

See EXPERT, 3, 4.

PLEADING.

See ASSAULT, 1; COMPLAINT; CONSTITUTIONAL LAW, 1; CRUELTY TO ANIMALS; DAMAGES, 8; DECEIT, 1; EXCEPTIONS, 14; FOREIGN JUDGMENT; INDICTMENT, 1-5; INSURANCE, 9, 11; JUDGMENT; NEGLIGENCE, 16, 18; PARTNERSHIP, 3; POOR DEBTOR, 8; VARIANCE.

PLEDGE.

Under Pub. Sts. c. 192, § 12, the right of a pledgee to dispose of the pledge is not limited to a foreclosure thereof. *Taft v. Church*, 527.

See TRANSFER OF STOCK.

POND.

See FISH AND FISHERIES.

POOR DEBTOR.

1. Upon an application by a judgment debtor to take the oath for the relief of poor debtors he was arrested on a charge of fraud, filed by the creditor under Pub. Sts. c. 162, § 17, cl. 5, which charge was as follows: "And now comes the creditor in the above entitled action and says that the action (upon which execution in said case was issued and the said debtor arrested) 'was founded on contract, that the debtor contracted the debt with an intention not to pay the same.'" The charges were signed and sworn to as required by the statutes. *Held*, that the action to which the poor debtor proceedings related, and the charge referred, furnished the debtor with all the information that he required. *Noyes v. Manning*, 14.
2. Poor debtor proceedings are in their main features of a civil, and not of a criminal nature, though if a debtor is found guilty upon a charge of fraud, he may be imprisoned. *Ibid*.
3. When a charge of fraud filed by a judgment creditor in poor debtor proceedings does not by reference to the action or otherwise furnish the particulars necessary to enable the debtor clearly to understand of what he is accused, the creditor may be required to file specifications, and if he fails so to do, the charge may be quashed if seasonable objection is made. *Ibid*.
4. Whether charges of fraud filed by a judgment creditor, under Pub. Sts. c. 162, § 17, against his debtor, upon the latter's application to take the oath for the relief of poor debtors, are sufficiently formal and precise, cannot, under c. 214, § 27, be brought to this court by a motion in arrest of judgment after a verdict of guilty of the charges. *Lamagdelaine v. Tremblay*, 339.

5. A motion to dismiss an action, in which charges of fraud were filed by a judgment creditor, under Pub. Sts. c. 162, § 17, against his debtor, upon the latter's application to take the oath for the relief of poor debtors, because of defects in the charges, was made at a certain sitting of the court, and related to the charges as they then stood. Amended charges and specifications properly sworn to, and the sufficiency of which was not questioned by the motion to dismiss, were made several months later, and the trial at which the debtor was convicted and sentenced was upon the amended charges and specifications. *Held*, that the motion to dismiss was rightly overruled; and that the question of the sufficiency of the amended charges and specifications was not strictly brought before this court by an appeal from the order overruling the motion. *Lamagdelaine v. Tremblay*, 339.
6. If one of several charges of fraud filed by a judgment creditor, under Pub. Sts. c. 162, § 17, against his debtor, upon the latter's application to take the oath for the relief of poor debtors, is well pleaded, a motion to dismiss the action because of defects in the charges cannot be sustained. *Ibid*.
7. A person in the employ of the attorney of record of a judgment creditor, who files charges of fraud, under Pub. Sts. c. 162, § 17, against his debtor, upon the latter's application to take the oath for the relief of poor debtors, is not disqualified by interest to act as a magistrate in taking the creditor's oath to the charges. *Ibid*.
8. In an action against the sureties upon a poor debtor's recognizance, it is not necessary that the declaration should show that any citation was served upon the principal defendant when annexed to it are copies of the execution, the creditor's affidavit upon his application for the arrest of the debtor, and the certificate of the court stating "that it appears from the evidence before the said court that said debtor has been duly notified to appear before the said court for examination," for this imports that notice has been given, and it must be taken as true. *Stearns v. Hemenway*, 17.
9. In poor debtor proceedings two defendants may be joined in one citation. *Ibid*.
10. A poor debtor recognizance requiring the principal defendant to deliver himself up "for examination before some magistrate authorized to act" is to be construed as if it required the debtor to deliver himself up for examination before some court or magistrate named in St. 1888, c. 419. *Ibid*.
11. Execution was obtained against two defendants, and upon the application of the judgment creditor for the arrest of one of them he made affidavit that "the debtors named in said execution have property not exempt from being taken on execution which they do not intend to apply" to the payment of the judgment. The certificate having stated that the "court is satisfied there is reasonable cause to believe that the charges made in the foregoing affidavit are true," certified that "said debtor has been duly notified to appear before the said court for examination." *Held*, that the word "debtors" in the affidavit should be regarded as having been used in a distributive sense, and should be construed as if it read "the debtors named in said execution have each property," etc., and that the words "said debtor" in the certificate, which is to be considered in connection

with the affidavit, should be construed as if they read "each said debtor," or "each debtor aforesaid." *Stearns v. Hemenway*, 17.

12. A statement in an affidavit made upon an application for the arrest of two judgment debtors, "that the debtors A. and B., named in the said execution, have property not exempt from being taken on execution which he does not intend to apply to the payment of the judgment," is to be construed distributively, as if it read, "the debtors A. and B. . . . each have property . . . which he does not intend to apply to the payment of the judgment." *Kellogg v. Leach*, 45.

See APPEAL, 1; EXCEPTIONS, 12.

POWER.

See DEVISE AND LEGACY, 7; EXECUTOR, 1.

PRACTICE.

See AUDITOR; DECEIT, 1; EQUITY, 4, 5; EVIDENCE, 1, 5, 13; EXCEPTIONS; FOREIGN JUDGMENT; INDICTMENT; LEASE, 7; NEW TRIAL; PARTITION; PARTNERSHIP, 3; POOR DEBTOR; PROMISSORY NOTE, 1; SUPREME JUDICIAL COURT; TENDER; TRIAL; TRUSTEE PROCESS; VARIANCE; VERDICT.

PREFERENCE.

See INSOLVENT DEBTOR.

PRESCRIPTION.

See BOUNDARY, 3; EASEMENT, 1, 3, 4.

PRESUMPTION.

See DEED, 6; INSURANCE, 2; NEGLIGENCE, 11; PERJURY.

PRINCIPAL AND AGENT.

1. In an action against the members of a college class, for work done and materials furnished in the publication of a book, there was evidence from which the court might infer that the defendants voted at a class meeting to publish the book, or assented to the vote, and elected as "business manager of the publication" A., one of their number, who made with the plaintiff the contract in suit. The court found for the plaintiff. *Held*, that the contract was within the scope of A.'s employment, and that the defendants had no ground of exception. *Willcox v. Arnold*, 577.

2. By separate written agreements, both executed on the same day, A. and B. each bound himself to convey his land to the order of C. for a consideration named, and to pay him a brokerage commission for effecting a sale of it. Subsequently A., by the direction of C., conveyed his land to B., and gave to C. an order to receive the consideration. C. collected from B. a larger sum than the consideration named, receipted for it, and, after paying over to A. the price named by him, retained for himself the excess which he had received from B. A. afterward paid C. his brokerage commission. *Held*, in an action by A. against C. to recover the excess so retained by him, that, if C. was acting as the agent or broker of A., good faith required that he should account to him for all that he received from the sale of his property, and that there was evidence proper to be considered on which it would have been competent for the jury to find that the transaction was in substance one where A. and B. were engaged as principals and C. was acting as their agent or broker, and whether C. was so acting was a question of fact which should have been submitted to the jury. *Bassett v. Rogers*, 47.
3. In an action for personal injuries occasioned by an explosion in the basement of a building, it appeared that the building had been conveyed by A. to the defendant as trustee for A.'s creditors; that the defendant, by his agent B., had made a written lease of the building to C., who had made an agreement for a sublease of the basement to D., to take effect on a certain day; that in the basement were engines, boilers in a cement-lined pit, and in the boilers was some bisulphide of carbon; that, at the time of the lease to C., B. agreed to remove everything in the basement, except a certain engine and a shaft, and retained a key to the basement; and that later B. asked that certain things might remain there, and C. assented if D. did not object. There was evidence that, before the sublease took effect, D. and the plaintiff, who was interested in D.'s business, went to B., just outside the basement, and asked him what things he wanted to have remain; and that B. answered, "Come in and I will show you." It further appeared that before this time B. had removed some of the things, and had drawn off some of the bisulphide of carbon, but in the process some of it had been spilled upon the bottom of the pit; and that the parties went into the basement, and an explosion happened, which according to the plaintiff's testimony was caused by his accidentally knocking a piece of iron into the pit and making a spark. The plaintiff and D. denied that they had been told by any one of the presence of the explosive. *Held*, that there was evidence sufficient to be submitted to the jury upon the question whether B., in his alleged invitation to the plaintiff, was acting on behalf of the defendant, and within the scope of his authority. *Baker v. Tibbets*, 468.

See EVIDENCE, 36; INSURANCE, 7-12; NATIONAL BANK; PARTNERSHIP, 1, 2; PROMISSORY NOTE, 3.

PRIVILEGED COMMUNICATIONS.

See EVIDENCE, 40; SLANDER.

PROBATE COURT.

See ESTATES OF PERSONS DECEASED; PARTITION, 2; QUIETING TITLE, 1;
SUPREME JUDICIAL COURT, 7, 8.

PROMISSORY NOTE.

1. In an action upon a promissory note, which was indorsed by the defendant in blank before delivery, if the plaintiff puts in evidence a written waiver by the defendant of demand, protest, and notice, the defendant is not entitled to a ruling, as matter of law, in his favor; and if the defendant does not rest his case on the plaintiff's evidence, but afterwards introduces evidence, he cannot compel the court to rule upon the plaintiff's evidence. *State Trust Co. v. Owen Paper Co.* 156.
2. A paper writing, directed to the payee and holder of a promissory note, signed by a person who has indorsed the note in blank before delivery, and stating that he is an indorser and waives demand, protest, and notice, is some evidence, in an action upon the note, that he understood that he was such an indorser as by due demand and notice could be held liable on the note to the payee. *Ibid.*
3. In an action upon a promissory note made in another State, payable to a corporation, and indorsed in blank before delivery, and above which indorsement the name of the payee and the words "without recourse" were written by the secretary of the corporation after the action was begun, if the judge who tries the case without a jury finds that, "in the trial of causes in" the other State, "the indorsement of the payee without recourse may be put on at any time before judgment, or, being merely formal, will be assumed to be made," it is immaterial whether the secretary of the corporation had special authority to make the indorsement. *Ibid.*
4. A promissory note was made payable to a trust company, signed by a corporation and indorsed in blank before delivery by a man who owned nearly all the stock of the corporation, and by his wife, who was its president, and recited that a certain number of shares of its stock had been pledged to the payee as security "with authority to sell the same on non-performance of this promise, in such manner as" the payee, "in their discretion, may deem proper, without notice, . . . and to apply the proceeds thereon"; and authority was also given to the payee to purchase at the sale, if at public auction, and it was agreed that the securities, or any substitutes therefor or additions thereto, were to be held as collateral, and be applicable to any "other note or claim held against us by said company." In an action upon the note, the judge, who tried the case without a jury, found that the female defendant, who alone defended, "signed her name on the back of the note in suit at her husband's request, and to accommodate him either personally or as treasurer of the" corporation, "and that she intended that her husband should use the note, and intended to give her credit to any one who might loan money on it"; and found for

the plaintiff. *Held*, that the plaintiff was entitled to judgment on the finding. *State Trust Co. v. Owen Paper Co.* 156.

5. Successive indorsers of a note for the accommodation of a third person are liable in the same order as indorsers for value, in the absence of special agreement. *Moore v. Cushing*, 594.
6. In an action on a promissory note payable to the plaintiff on demand, and purporting to be signed by the defendant's intestate by his mark, the judge refused to instruct the jury, at the defendant's request, that the evidence from the paper itself should be given less weight than would attach to it if it purported to bear the genuine signature of the plaintiff's intestate, and instructed them that while he could not say, as matter of law, that the note would not carry as much force as if the intestate had signed it himself, if he were able to write his name, still it was a circumstance for them to take into account in passing upon the evidence. *Held*, that the ruling given was sufficiently favorable to the defendant, and that, if the jury were satisfied that the note was executed by the intestate by his affixing his mark to it, it could not be said, as matter of law, that it should be given less weight than if he had signed his name to it. *Bliss v. Johnson*, 323.

See CONTRACT, 5; EVIDENCE, 42; JUDGMENT; MORTGAGE; TRANSFER OF STOCK; VARIANCE, 2.

PURCHASER FOR VALUE.

See EASEMENT, 4.

QUIETING TITLE.

1. The recorded deed of an executor who purports to sell land of the testator under the license and authority of the Probate Court, when in fact he has no such license or authority either from the Probate Court or under the will of the testator, does not convey such a record title as will enable the grantee thereunder to maintain a petition under St. 1893, c. 340, against the devisees of the testator, to compel them to bring an action to try their alleged title to the land. *Arnold v. Reed*, 438.
2. The St. 1893, c. 340, relative to quieting titles to real estate, does not extend to persons claiming under deeds in which the grantor purports to convey the land of others when no authority to make the conveyance appears of record in the registry of deeds or elsewhere. *Ibid.*
3. At the hearing upon a petition under St. 1893, c. 340, to compel the devisees of a parcel of land to bring an action to try their alleged title to the land, which the executor of the will, without authority, sold and conveyed to the petitioner, this court cannot consider the effect of proof offered by the petitioner that all persons interested in the estate at the time of the sale and conveyance acquiesced in the sale, and received without objection their share of the purchase money. *Ibid.*

RAILROAD.

See BURDEN OF PROOF, 2, 3; CONSTITUTIONAL LAW, 3; EMPLOYERS' LIABILITY ACT, 1, 2; EVIDENCE, 12, 13, 26, 27, 29, 30, 39; GRADE CROSSING; HUSBAND AND WIFE; MASTER AND SERVANT, 1, 2; NEGLIGENCE, 12-22; NEW TRIAL, 1; PASSENGER; WAY, 3.

RAPE.

A defendant can be convicted on an indictment charging an assault with intent to commit rape, if the evidence satisfies the jury that his crime was rape. *Commonwealth v. Creadon*, 466.

See EVIDENCE, 5; TRIAL, 7.

REAL ESTATE.

See ACTION, 1-3; BOUNDARY; CONTRACT, 1; DAMAGES, 4; DEVISE AND LEGACY, 1; EASEMENT; EVIDENCE, 8, 33, 35, 36; EXECUTOR, 1, 2; EXPERT, 2; FENCE; GRADE CROSSING; LEASE, 1-7; MECHANIC'S LIEN; NEGLIGENCE, 1; PARTITION; PARTY WALL; PRINCIPAL AND AGENT, 2, 3; QUIETING TITLE; TOWN.

REASONABLE TIME.

See INSURANCE, 14.

RECEIPT.

See EVIDENCE, 16.

RECEIVER.

See EQUITY, 3; EVIDENCE, 23, 24.

RECOGNIZANCE.

See POOR DEBTOR, 8, 10, 12.

RECORD.

See EASEMENT, 4; LEASE, 7; MORTGAGE, 1; QUIETING TITLE, 1, 2; SUPREME JUDICIAL COURT, 4-6.

REGISTRY OF DEEDS.

See EASEMENT, 4; LEASE, 1, 7; MECHANIC'S LIEN, 2, 3; QUIETING TITLE, 1, 2.

RELEASE.

See CONTRACT, 11; DEED, 8; WAY, 8.

RELIGIOUS SOCIETY.

See TAX, 3.

REMAINDER.

See TAX, 1.

RENT.

See ASSAULT, 3; EXECUTOR, 1, 2; LEASE, 4-6, 8.

REPLICATION.

See FOREIGN JUDGMENT; VARIANCE, 2.

REPORT.

See AUDITOR; CONTRACT, 7; EQUITY, 5; SUPREME JUDICIAL COURT, 5.

RESERVATION.

See DEED, 3-5; EASEMENT, 5; EQUITY, 1.

RESTRICTION.

See DEED, 7, 8.

REVERSION.

See ACTION, 1, 2; TENANT AT WILL.

RULES OF COURT.

See EXCEPTIONS, 1.

SALE.

See BROKER; BURDEN OF PROOF, 1; DAMAGES, 1-3; EVIDENCE, 6, 7; FRAUDS, STATUTE OF; INTOXICATING LIQUORS, 2, 3, 5; OLEOMARGARINE; PARTITION; TENDER; TRIAL, 14.

SAVINGS BANK.

1. In an action to recover money deposited by the plaintiff with the defendant savings bank the exceptions stated that "there was no evidence that the claimant ever gave the book to the plaintiff, except when the claimant ordered the plaintiff to make withdrawals or deposits." The plaintiff requested the judge to rule that it was immaterial to whom the money originally belonged; if the claimant delivered the book to the plaintiff and permitted him to exercise control over the same, the gift was complete, and the claimant could not come in and claim the funds. *Held*, that the ruling was rightly refused. *Booth v. Bristol County Savings Bank*, 455.
2. In an action to recover money deposited by the plaintiff with the defendant savings bank, it appeared that the claimant, who intervened under the St. of 1894, c. 317, § 33, deposited the money and took out the book in the name of the plaintiff. The plaintiff requested the judge to rule that, if the book was delivered to the plaintiff without the intention on the part of the claimant of parting with his title to the funds, the verdict must still be for the plaintiff. *Held*, that the ruling was rightly refused, and that the ruling that it was for the jury to say, upon the evidence, whether the claimant had ever made a gift of the money to the plaintiff, as the plaintiff contended, or whether it was as the claimant contended, was correct. *Ibid*.

SEAL.

See ACTION, 5; CONTRACT, 2; PARTNERSHIP, 1.

SIDEWALK.

See NEGLIGENCE, 3; NOTICE; TOWN; TRIAL, 18, 19.

SIGNATURE.

See EVIDENCE, 23; PROMISSORY NOTE, 6.

SLANDER.

At the trial of an action for slander it appeared that the defendant, whose goods had been stolen and who was trying to find the thief, made charges against the plaintiff in the presence and hearing of two other witnesses. *Held*, that the case could not be withdrawn from the jury on the ground that the words were privileged by the occasion. *Held, also*, that the plaintiff was entitled to go to the jury upon the questions of the defendant's good faith in making the charges, and of his actual malice. *Hupfer v. Rosenfeld*, 131.

SPECIFIC PERFORMANCE.

1. A negative covenant in a contract of hiring will not be enforced where, if the court had the power, it would not enforce an affirmative covenant. *Rice v. D'Arville*, 559.

2. A., a theatrical manager, and B., a singer, entered into a written contract, by the terms of which A. engaged B. to render services to him for a certain period at a stated salary. The contract also contained the provisions that B. "hereby agrees to render said services to the best of her ability at any theatre desired by" A. "in a correct and painstaking manner"; and that B. "hereby agrees that she will not render services at any other place of amusement . . . from the date of the commencement of this contract to its close, except those under the management of" A. After the contract was executed, but before it was operative, A. became indebted to B. for services rendered under a previous contract, and was unable to pay her, and would be unable to perform his part of the second contract, unless the theatrical season proved successful. B. repudiated this contract, and entered into an engagement with another manager. A. thereupon brought a bill in equity to restrain B. from singing except under his management, and, at the hearing, a bond to the satisfaction of the court for the performance of A.'s part of the contract was offered by him. *Held*, that the bill could not be maintained. *Rice v. D'Arville*, 559.
3. Inability on the part of the plaintiff to perform his part of an agreement is a good ground for refusing to enforce the agreement against the defendant in a bill in equity for specific performance. *Ibid*.
4. After one party to a contract has, for good cause, refused to perform his part, and has entered into other engagements, the offer by the other party of a bond for the performance of his part of the contract is of no effect. *Ibid*.

See CORPORATION, 3, 4; LEASE, 2.

SPRINGFIELD.

See CITY, 3.

STATE BOARD OF LUNACY AND CHARITY.

See INFANT, 2.

STATUTE.

See ACTION, 6; BENEFICIARY ASSOCIATION, 1, 3, 4; BOARD OF HEALTH; CITY, 2, 4; COMPLAINT, 1; CONSTITUTIONAL LAW, 2, 3; CORPORATION, 1, 2; CRUELTY TO ANIMALS; DEVISE AND LEGACY, 3; EMINENT DOMAIN, 1; EMPLOYERS' LIABILITY ACT; EVIDENCE, 12, 23, 24; EXCEPTIONS, 12; FENCE; FISH AND FISHERIES; FRAUDS, STATUTE OF; GRADE CROSSING; GUARANTY; INFANT, 2; INTOXICATING LIQUORS, 1; LEASE, 1, 7; LIMITATIONS, STATUTE OF, 1, 2; MECHANIC'S LIEN, 1; NOTICE, 1; OLEOMARGARINE; PARTITION, 1; PARTNERSHIP, 3; PASSENGER, 1; PERJURY; PLEDGE; POOR DEBTOR, 1, 4-7, 10; QUIETING TITLE, 2, 3; SAVINGS BANK, 2; SUPREME JUDICIAL COURT, 1, 2; TAX; TRIAL, 4; WAY, 2.

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

STATUTES CITED, EXPOUNDED, ETC.

STATUTES OF THE UNITED STATES.

June, 30, 1864.	Tax	118
July 13, 1866.	"	118

STATUTES OF CONNECTICUT.

Gen. Sts. 1888, § 1106.	Judgment	327
-------------------------	----------	-----

STATUTES OF NEW YORK.

1890, c. 553, § 1.	Tax	126
--------------------	-----	-----

STATUTES OF THE COMMONWEALTH.

1783, c. 46.	Probate Court	452
1818, c. 180.	Massachusetts Hospital Life Ins. Co.	152
1826, c. 109.	Equity	453
1834, c. 448, §§ 35, 39.	Boston	512, note
1835, c. 143, § 1.	Greenfield Tool Co.	393
1859, c. 196, §§ 49, 50.	Supreme Judicial Court	453
— c. 237, §§ 7, 12.	Equity	452
1864, c. 250, § 3.	Indictment	340
1865, c. 153, § 6.	Cambridge	600
— c. 283.	Tax	121
1869, c. 182.	New England Trust Co.	149
1870, c. 257.	Partition	386
1871, c. 111.	"	386
— c. 381, § 49.	Street Railway	71
1874, c. 372, § 163.	Railroad	71
1875, c. 99, § 1.	Intoxicating Liquors	516
— c. 136, § 1.	Mayor and Aldermen	498
— c. 165, § 6.	Cambridge	600
1878, c. 275.	Tax	121
1881, c. 199, §§ 1, 6.	Railroad	71
1882, c. 195, § 2.	Beneficiary Association	100
— c. 237.	Quieting Title	440
1884, c. 256, § 10.	Cambridge	600
1885, c. 183, §§ 1, 5, 10.	Insurance	100

1885, c. 283.	
— c. 349, §§ 2, 3.	
— ——— § 6.	
— c. 374, § 52.	
— c. 384, §§ 2, 3.	
1887, c. 214, §§ 60, 105.	
— c. 270.	
— ——— § 1, cl. 1.	
— ——— § 1, cl. 2.	
— ——— § 1, cls. 1, 2.	
— ——— §§ 1, 2.	
— ——— § 2.	
— ——— § 3.	
— c. 347.	
— c. 348.	
1888, c. 137, § 7.	
— c. 277.	
— c. 419, § 12.	
— c. 429.	
— ——— § 8.	
1889, c. 442.	
1890, c. 341.	
— ——— § 1.	
— c. 410.	
— c. 421.	
— c. 427.	
— c. 428.	
— ——— §§ 7, 8.	
1891, c. 58, § 1.	
— c. 252.	
— ——— § 4.	
— c. 287.	
— c. 364, §§ 9, 38.	
— c. 379, § 2.	
— c. 412, § 4.	
— c. 425, §§ 1, 17.	
— ——— § 2.	
— ——— §§ 4, 18.	
1892, c. 127.	
— c. 171, § 1.	
— c. 191.	
— c. 318, §§ 1, 2, 3-6, 7, 9.	
— c. 372.	
— c. 419.	
— c. 421, § 8.	
1893, c. 340.	
— c. 359.	
1894, c. 204.	

Quieting Title	440
Lamson & Goodnow Manuf. Co.	390
“ “ “	395
Party Wall	88
Practice	453
Insurance	481
Employers' Liability Act	317, 471, 549
“ “ “	198
“ “ “	185
“ “ “	335
“ “ “	335
“ “ “	71
“ “ “	337
Venue of Action	452
Fence	544
Cambridge	600
Intoxicating Liquors	218
Poor Debtor	21
Beneficiary Association	552
“ “	100
Quieting Title	440
Beneficiary Association	100
“ “	554
Trespass	584
Insurance	100
Quieting Title	440
Railroad	170
“	565
Oleomargarine	521
Easthampton	423
“	425
Courts	452
Cambridge	601
Indictment	94
Oleomargarine	507
Tax	126
“	124
“	125
Supreme Judicial Court	94
Railroad	82
Mechanic's Lien	433
Care of Infants	597
Insurance	241
Boston Building Act	88
Cambridge	600
Quieting Title	439
Employers' Liability Act	317
Indictment	94

Mass.]	INDEX.	689
1894, c. 317, § 33.	Savings Bank	457
— c. 469, § 2.	Railroad	72
— c. 520, § 6.	Cambridge	600

REVISED STATUTES.

c. 81, § 20.	Supreme Judicial Court	453
--------------	------------------------	-----

GENERAL STATUTES.

c. 24, § 29.	Fire Department	570
c. 113, §§ 18, 19, 20, 22, 26.	Supreme Judicial Court	453
c. 117, § 14.	Probate Court	452

PUBLIC STATUTES.

c. 35, § 34.	Fire Department	570
c. 49, §§ 18-31.	Way	64
c. 52, § 19.	"	192
c. 53, § 15.	"	497
c. 77, § 15.	Indorser	160
c. 78, § 1, cl. 4.	Statute of Frauds	579
c. 80, § 43.	Contagious Disease	179
c. 91, § 27.	Inland Fisheries	220
c. 100, § 1.	Intoxicating Liquors	516
— § 10.	" "	519
— §§ 30, 32.	" "	217
— §§ 37, 40, 41.	" "	218
c. 106, § 42.	Corporation	394
— § 60.	"	395
c. 112, §§ 113, 138.	Railroad	84
— §§ 163, 164, 166.	"	135
— § 212.	"	69
c. 115, § 8.	Beneficiary Association	100
c. 116, § 31.	Savings Bank	457
c. 120, § 4.	Deed	61, 112, 476
c. 122, § 3.	Easement	88
c. 127, § 23.	Will	450
c. 137, § 13.	Insolvent Estates	454
c. 139, § 11.	Guardian	584
c. 146, § 41.	Divorce	222
c. 150, § 35.	Supreme Judicial Court	452
c. 151, § 23.	Equity	452
— §§ 25, 30, 31, 33.	"	453
c. 153, § 5.	Courts	244
— § 6.	"	398
— § 8.	Exceptions	338, 462
— § 15.	"	95
— § 16.	"	94

c. 156, §§ 1, 27.	Probate Court	440
—— § 11.	“ “	452
c. 157, § 96.	Insolvency	191
c. 162.	Poor Debtor	20
—— § 17.	“ “	339
—— ——— cl. 5.	“ “	16
c. 167, § 26.	Answer	301
—— § 81.	Practice	525
—— § 82.	Arrest of Judgment	340
c. 169, § 18, cl. 1.	Witness	414
—— ——— cls. 2, 3.	“	443
c. 171, § 5.	Judgment	533
c. 176.	Quieting Title	440
c. 178, §§ 26, 65.	Partition	386
c. 183, §§ 17, 35, 36.	Trustee Process	526
c. 190.	Mill Act	425
c. 191, § 1.	Mechanic's Lien	593
—— § 2.	“ “	594
—— §§ 3, 6, 8.	“ “	433
c. 192, §§ 10, 11, 12.	Pledge	533
c. 197, § 1, cl. 4.	Statute of Limitations	413
—— § 14.	“ “	413
c. 202, § 20.	Assault and Battery	495
c. 207, § 52.	Cruelty to Animals	517
c. 214, § 18.	Indictment	466, 496
—— § 27.	Arrest of Judgment	340

STREET.

See HIGHWAY.

SUPERIOR COURT.

See APPEAL ; EXCEPTIONS, 1 ; GRADE CROSSING, 3 ; SUPREME JUDICIAL COURT, 4-6.

SUPPORT.

See DEVISE AND LEGACY, 5 ; PARENT AND CHILD.

SUPREME JUDICIAL COURT.

1. The St. 1892, c. 127, entitled “ An act authorizing the transfer of cases in the Supreme Judicial Court,” was intended to give to the full court, upon application of a party, full power to determine the place of hearing questions of law in any case, including capital cases, and it does not take away the jurisdiction of the justices before whom the trial is had to make such

prior orders as are authorized by Pub. Sts. c. 153, § 16, or by St. 1891, c. 379. *Commonwealth v. Robertson*, 90.

2. The St. 1892, c. 127, entitled "An Act authorizing the transfer of cases in the Supreme Judicial Court," gives jurisdiction as soon as questions have been put in form for hearing, so that nothing remains to be done but to make the formal entry of them in the full court which Pub. Sts. c. 153, § 15, directs the clerk to make "as soon as may be"; and there is no good reason why they should first be entered in the county where the trial is had, and then transferred to Suffolk or some other county. *Ibid.*
3. An order of this court recited that whereas on a certain date application was made to the Supreme Judicial Court, sitting as a full court in the county of Suffolk for the Commonwealth, by the Attorney General, praying that the exceptions in a capital case be assigned and heard by the full court sitting at Boston for the Commonwealth, upon which application the parties were heard by the full court; it was ordered that the questions of law arising upon the exceptions be assigned and heard by the full court sitting at Boston for the Commonwealth on a specified day and at a certain hour. *Held*, that the form of the order was sufficient, and that the words "assigned and heard by the full court sitting in Boston" are equivalent to "entered and heard by the full court" sitting in Boston. *Ibid.*
4. Upon an appeal from the taxation of costs, the judgment of the Superior Court disallowing an item for the storage of goods attached cannot be revised by this court where no facts upon which the correctness of the judgment depends and no ruling of law appear upon the record. *Carroll v. Daly*, 427.
5. A statement of facts agreed to by the counsel of the parties and filed in the Superior Court after a hearing therein, accompanied by a stenographic report of the testimony taken at the hearing, cannot be considered by this court if it does not appear by the record to have been passed on in the Superior Court. *Ibid.*
6. An appeal from the judgment of the Superior Court brings before this court only matters of law apparent on the record. *Ibid.*
7. A single justice of this court sitting in equity may order a probate appeal to be heard in a county other than that in which it is brought. *Ripley v. Collins*, 450.
8. Where, upon a petition to the Probate Court for the construction of a will, the procedure was not according to the rules of pleading and practice in equity causes, but all persons interested were shown to have appeared and been there heard, they were afterward heard in this court on appeal, both by a single justice and the full court. *Horton v. Earle*, 448.

See APPEAL; ESTATES OF PERSONS DECEASED; NEW TRIAL, 1; POOR DEBTOR, 4; QUIETING TITLE, 8.

TAX.

1. The provisions of § 2 of St. 1891, c. 425, entitled "An Act imposing a tax on collateral legacies and successions," to the effect that where property is

bequeathed to a direct heir for life or for a term of years, and the remainder to a collateral heir or to a stranger to the blood, the value of the prior estate shall be appraised and deducted from the appraised value of the property, and the remainder shall be subject to a specified tax, contemplate that the tax shall be computed and deducted from the principal sum and paid over to the Treasurer of the Commonwealth, under § 4, "at the expiration of two years from the date" of the executor's bond, or when the legacy is paid, if paid within the two years; and the amount of the loss of the income of the tenant for life or for years caused by the diminution of the principal of the fund is not to be made up to him out of the principal or out of the general funds of the estate. *Minor v. Winthrop*, 113.

2. The St. 1891, c. 425, imposing a tax on collateral legacies and successions, contemplates in the case of an annuity that the tax is to be paid out of the annuity as soon as the annuity becomes payable, and at the time when payments on account of it are made. *Ibid.*
3. The exemption under St. 1891, c. 425, § 1, of "charitable, educational, or religious societies or institutions, the property of which is exempt by law from taxation," from the payment of the tax imposed by that statute, is confined to societies the property of which is exempt from taxation by the laws of this Commonwealth. *Ibid.*

See CONSTITUTIONAL LAW, 2 ; EVIDENCE, 29.

TENANT AT WILL.

A tenant at will in possession of a house in a city cannot, as against the rights of the owner, authorize the board of health of the city to establish in the house a hospital for patients afflicted with an infectious disease, and to maintain such a hospital there to the damage of the reversion. *Hersey v. Chapin*, 176.

See ACTION, 2.

TENANT FOR LIFE.

See DEVISE AND LEGACY, 4, 5.

TENDER.

A tender by A. to B. of a sum of money, before suit brought, is an acknowledgment by A. of the cause of action, and he cannot afterwards avail himself of the defence, in an action by B. for goods sold, that B. in making the sale was only acting as agent of C. *Noble v. Fagnant*, 275.

See CONTRACT, 10, 11.

TITLE.

See LEASE, 7; MORTGAGE, 1.

TORTS.

See ACTION, 1-3; BOARD OF HEALTH; DAMAGES, 4; DECEIT; EMPLOYERS' LIABILITY ACT; EVIDENCE, 1, 2, 10-13, 26-31, 37, 39; LAW OF THE ROAD; LEASE, 7; MASTER AND SERVANT; NEGLIGENCE; SLANDER; TRIAL, 17-19.

TOWN.

A by-law of a town provided that "the tenant, occupant, and in case there shall be no tenant, the owner, . . . having the care of any land or building fronting on any street . . . where there is a concrete . . . sidewalk, shall after the ceasing to fall of any snow . . . within twenty-four hours cause the same to be removed," or "shall sprinkle thereon sand," etc.; and in default thereof should pay a certain penalty. In an action against the owner to recover the penalty for failure to remove the snow, it appeared that his house was divided into two tenements, one of which was occupied by a tenant and the other was vacant; that the tenant, as tenant, had no control over the vacant tenement and the land in front, and that by an agreement with the owner the tenants were to clear the snow and ice from the sidewalk, and there were no limits fixed as to how much each should clear off. *Held*, that the word "building" in the by-law was sufficient to describe the part of the house which had been vacated by the defendant's tenant, and which at the time when the snow was unremoved was in the care of the defendant as owner; that it was the owner's duty to attend to the sidewalk, and his failure so to do rendered him liable; that the by-law in terms applied to a person having the care of any land fronting on a street, as well as to the person having the care of the building; and that if one tenement became vacant it was not the duty of the remaining tenant, as tenant, to clear the entire sidewalk. *Easthampton v. Hull*, 302.

See ACTION, 4; CITY; EVIDENCE, 8, 37; HIGHWAY; INTOXICATING LIQUORS, 5; NOTICE.

TRANSFER OF STOCK.

1. If A. agrees that, in consideration of B.'s advancing a certain sum of money to C. and accepting from C. his promissory note and shares of a certain corporation as collateral security therefor, if the note is not paid at maturity, A. will purchase the shares of B., and, at the time when C.'s note matures, B. has in his possession a certificate for the shares of stock made out in C.'s name, and on the back of which are a printed form of transfer and a power of attorney to make a transfer of the shares, this is sufficient to transfer the certificate to B. *Taft v. Church*, 527.
2. If, by the terms of a promissory note, for the payment of which shares of stock are pledged as collateral security, the pledgee has authority to sell the stock, on breach of the promise to pay the note, without notice to the pledgor, he may, before such breach, make a valid agreement to sell the stock when that contingency shall happen. *Ibid*.

3. In an action upon an agreement, by the terms of which the defendant agreed that, in consideration of the plaintiff's advancing a certain sum of money to a third person and accepting from the latter his promissory note and shares of a certain corporation as collateral security therefor, if the note was not paid at maturity, the defendant would purchase of the plaintiff the shares, or so many of them as should amount to the sum due on the note, at a stated price per share, the fact that there is no evidence of the value of the stock is immaterial. *Taft v. Church*, 527.

See PARTNERSHIP, 1.

TRAVELLER.

See LAW OF THE ROAD; NEGLIGENCE, 13.

TRESPASS.

See ACTION, 1, 2; ASSAULT; BOARD OF HEALTH; LEASE, 8.

TRIAL.

1. A person on trial for a crime not capital, who is defended by counsel, has no right to make an unsworn statement of facts to the jury. *Commonwealth v. McConnell*, 499; *Commonwealth v. Burrough*, 513.
2. If a person on trial for a crime not capital, who is defended by counsel, is allowed to make an unsworn statement of facts to the jury, he has no ground of exception to a comment upon the weight to be given to such statement, and not upon his failure to testify, made by the prosecuting attorney in his argument to the jury, but which is afterwards withdrawn, upon the defendant's objection. *Commonwealth v. McConnell*, 499.
3. On the trial of an indictment for manslaughter, there is no error in sending word to the jury through the officer in charge of them, that, upon agreeing upon a verdict, they might put it in writing and separate, nor in permitting the jury after reassembling at the hour to which the court was adjourned to separate a second time, in order to allow the foreman to go home for the verdict, which he had accidentally left there. *Commonwealth v. Heden*, 521.
4. If, at the argument of a case, the counsel states the evidence on a certain point differently from what the presiding judge supposes it to be, it is within his province to call the counsel's attention to the fact, and to state what his recollection of it is, and also, in his charge to the jury, to call their attention to the question of what the evidence is, leaving the question to their determination; and such a course is not a charge upon a matter of fact, within the prohibition of Pub. Sts. c. 153, § 5, but merely a reference to the testimony which the judge has a right to make. *Commonwealth v. Walsh*, 242.
5. If a bill of exceptions in a criminal case states that the presiding judge, in his charge to the jury, said that there was a dispute between the defend-

ant's counsel and the prosecuting attorney as to what the defendant testified on a certain point, and the defendant contends in this court that there is nothing in the bill of exceptions to show that there was any foundation for the statement of the judge, but the bill does not state in terms that there was no such dispute, nor purport to set forth all that was said on the subject by the prosecuting attorney, the defendant shows no ground of exception. *Commonwealth v. Walsh*, 242.

6. At the trial of an indictment against A. and B. jointly, for breaking and entering a dwelling-house and stealing therein, it appeared that, for several days next prior to that on which the crime was committed, the defendants had been working in a ditch near the house; and there was evidence tending to show that, on the day in question, the defendants saw the occupants of the house after they had left it to go to their work. A. testified that he started to go to work that day. The judge, in charging the jury, instructed them that if A. said that, it was for them to say "whether the defendants did not change their minds about that after they saw" the occupants of the house, "and knew the house was empty." *Held*, that the language of the judge was not open to the objection that the jury were instructed what inference to draw from A.'s testimony; and that the attention of the judge should have been called to the point that the language used by him was not properly applicable to both defendants. *Ibid*.
7. At the trial of an indictment for rape upon a girl alleged to be under sixteen years of age, the mother was asked, on direct examination, "Did your little girl complain to you of what this man [the accused] had done to her?" and she answered, "Yes." She also testified that the girl told her two days after the assault, and on the following day the physician examined the girl. The defendant objected, and the objection was overruled. *Held*, that, although the question was improper in form because it introduced the name of the accused, yet, as the objection was not shown to have called the attention of the presiding justice to the point, and no request was made to withdraw the question and answer from the consideration of the jury, the defendant had no ground of exception. *Commonwealth v. Phillips*, 504.
8. At the trial of a complaint for keeping intoxicating liquors with intent unlawfully to sell the same, it is within the discretion of the presiding justice to decide that evidence of remarks of the defendant in the nature of an admission was not too remote. *Commonwealth v. Kyne*, 146.
9. A motion to require the government, at the close of its testimony, to elect upon which of several counts in an indictment it will rely, is addressed to the discretion of the presiding judge; and his refusal to order an election is not subject to exception. *Commonwealth v. Smith*, 508.
10. At the trial of an indictment for embezzlement no exception lies to the refusal of the court, at the close of the testimony for the government, to quash the first count of the indictment, because it then appeared that it was made up of several distinct items, some of which were included in the other three counts, the district attorney at that time having disclaimed any reliance upon the three acts of embezzlement charged in the other counts to support the charge contained in the first count, and having

elected the specific acts of embezzlement alleged upon which he relied to sustain each count; and the rights of the defendant are fully protected if the jury are instructed as to the effect of such election, the limitations of the government's case as finally submitted, and the application of the evidence thereto. *Commonwealth v. Smith*, 508.

11. If a question is put to a witness on cross-examination which is collateral or immaterial to the issue, his answer cannot be contradicted. *Ibid*.
12. A bill of exceptions stated that "during the delivery of the charge the plaintiff's counsel prepared the following requests for rulings, which he believed were proper because of the matter in the charge and the omissions therein, and at the close of the charge requested the court to give them," which the court declined to do. *Held*, that the questions raised by the requests were important and leading points in the case, on which counsel might assume that proper instructions would be given without requests therefor, and that he was not cut off from the presentation of them by the rule that requires requests for instructions on hypothetical statements of fact to be made before the arguments. *Brick v. Bosworth*, 334.
13. An instruction to the jury, in a case where a number of circumstances bearing upon a question of fact are in evidence, that a part of them are not of themselves sufficient to establish the fact, coupled with explicit instructions that they are to be considered, must be understood as directing the jury to weigh together all the pertinent circumstances, and not to draw their inference from a part without considering all. *Carmody v. Boston Gas Light Co.* 539.
14. If, in an action for goods sold, the plaintiff's evidence shows a refusal to warrant the quality of the goods, and the defendant relies upon an express warranty and a breach of it, he is not entitled to have the judge, who has instructed the jury fully upon the question of an express warranty, point out, at the close of the charge, the difference between an express warranty and an implied warranty. *Noble v. Fagnant*, 275.
15. In an action of contract to recover damages for the refusal to receive and pay for one hundred thousand advertising cards, fifty thousand G. C. and fifty thousand C. B., subject to approval of a sketch and of the first thousand of each, and of which one thousand of each had been sent to the defendant, it appeared that there was much correspondence between the parties, and also conversation and correspondence between the defendant and an agent of the plaintiff. One of the defendant's letters stated that the C. B. were right, but the delay in sending the G. C. was not right, and the defendant asked how long he must wait for the C. B. *Held*, that the judge properly left it to the jury to find upon the correspondence and conversation in connection with the other testimony in the case what the fact was in regard to the defendant having approved or disapproved of the cards, and that he properly refused to rule that there was "no approval of the G. C. one thousand in any of the letters, or of the C. B. one thousand." *Held, also*, that an exception "as to that portion of the charge as to the cards being sent for approval" was too general, and that the attention of the judge should have been called specifically to the particulars in which the defendant was aggrieved. *Hopcraft v. Kütredge*, 1.

16. If a judge instructs the jury fully, clearly, and fairly on the different matters involved in the trial and to which the testimony related, and dwells upon them no more than is necessary properly to discriminate and explain them for the benefit of the jury, it cannot be said that he instructed the jury on the facts. *Hopcraft v. Kittredge*, 1.
17. In the conduct of a trial for injuries and damages caused by the plaintiff's gig being forced on the truss of a bridge and overthrown in consequence of the alleged negligent driving by the defendant of another conveyance, it is within the discretion of the presiding justice to prevent the plaintiff's counsel from using for the first time during his argument to the jury representations of the truss and gig, and to order their removal from the presence of the jury. *Rand v. Syms*, 163.
18. In an action against a city for personal injuries occasioned by slipping upon ice on a sidewalk, the plaintiff's evidence tended to show that the ice was rough, and the defendant's that it was smooth. Upon the evidence reported to this court, it appeared that unless the ice was rough the plaintiff could not recover in any event. The jury found for the defendant, thus negating the view that the ice was rough. *Held*, that the plaintiff was not injured by a refusal to give certain instructions requested by her, founded on the assumption that the jury might find the ice to have been smooth, since in no case could she recover if the ice was smooth. *Cronin v. Holyoke*, 257.
19. At the trial of an action against a city for personal injuries occasioned by falling upon ice on a sidewalk, the judge submitted to the jury the following question, "Was there an imperfect construction of the sidewalk?" The jury, who returned a general verdict for the defendant, did not answer the question, and no answer was required by the judge or requested by either party. *Held*, that there was no error in the course of the judge in submitting the question to the jury; and that it could not be seen that the plaintiff was harmed thereby. *Ibid*.
20. At the trial of an action the plaintiff's counsel in his closing argument made certain observations from which it might be inferred that improper influence had been brought to bear on the jury, but there were no suggestions or intimations during the trial of anything on which they could be based. The defendant's counsel asked the judge to instruct the jury that there was no evidence to justify the use of the language, that it was uncalled for, and that they should give it no weight. The judge declined so to instruct the jury, but gave instructions which covered those requested, and told them in substance that they were to decide the case upon the law and the evidence, and nothing else. *Held*, that the defendant had no ground of exception. *Collins v. Greeley*, 273.
- See AUDITOR; BREACH OF PROMISE OF MARRIAGE, 4; EVIDENCE, 1, 5, 13, 29, 30; EXCEPTIONS; LEASE, 7; MASTER AND SERVANT, 3, 7; NEGLIGENCE, 8; NEW TRIAL; PERJURY; SUPREME JUDICIAL COURT, 7, 8.

TRUST AND TRUSTEE.

See CONTRACT, 9; DEVISE AND LEGACY, 7; EXECUTOR, 3.

TRUSTEE PROCESS.

1. In a trustee process, a claimant of the funds in the hands of the trustee cannot be allowed to prove that nothing was due from the trustee to the principal defendant. *Butler v. Butler*, 524.
2. If a claimant of the funds in the hands of the trustee, in a trustee process, alleges certain facts, but it does not appear that any evidence was introduced or offered in support of his claim, or that any ruling of law was asked or given in respect thereto, no question of law is presented to this court by his appeal from an order disallowing his claim. *Ibid.*
3. An objection to an order charging the trustee in a trustee process, on the ground that his supplemental answer was not upon oath, cannot be raised for the first time in this court upon an appeal from the order. *Ibid.*
4. If the answer of the trustee in a trustee process shows that a sum of money, which the trustee retained as a protection or security against a certain life estate, became absolutely due to the principal defendant by the extinction of that estate prior to the service upon the trustee, the latter is properly charged upon his answer. *Ibid.*

See ASSIGNMENT; EXCEPTIONS, 13.

TRUST FUND.

See EVIDENCE, 24.

USER.

See EASEMENT, 1-3.

VARIANCE.

1. A count upon an oral contract to insure property in a place to which it has been removed during the existence of a policy of insurance thereon is not sustained by proof of an agreement to transfer the policy so as to cover the property in the new place. *Parker v. Rochester German Ins. Co.* 479.
2. The declaration in an action against A., the maker, and B., the indorser, of a promissory note made to the plaintiff in another State, alleged that B. indorsed the note in blank before delivery. The answer set up that, by the law of the other State, B. did not, by signing the note before delivery, become liable to the payee. The plaintiff filed a replication, stating that, since the action was brought, he had indorsed the note without recourse above the signature of B.; and that, by the law of the other State, he was entitled so to do, and B. was thereby made expressly liable to him upon his indorsement. The note offered in evidence contained on its back the name of the payee, and the words "without recourse" written above B.'s name. *Held*, that there was no variance between the note introduced in evidence and the note described in the pleadings. *State Trust Co. v. Owen Paper Co.* 156.

8. At the trial of a complaint charging the defendant with the illegal sale of intoxicating liquors to one Pierre A. Maguant, a witness for the government testified that he had always heard the purchaser called Peter and never Pierre. Two other witnesses for the government testified that they had never heard any one call him by the name of Pierre, but that he had told them that that was his name. *Held*, that the judge rightly refused to rule that there was a variance, and properly left it to the jury to determine whether his name was Pierre or not. *Commonwealth v. Gay*, 458.

See INSURANCE, 9.

VENUE.

See SUPREME JUDICIAL COURT, 7.

VERDICT.

1. The court may set aside a verdict as against the evidence, although a motion to direct a verdict for the defendant has been denied. *Clark v. Jenkins*, 397.
 2. In this Commonwealth there is no rule of law limiting the number of times that a judge may set aside a verdict as against the evidence. *Ibid*.
- See DECEIT, 1; INSURANCE, 8; INTOXICATING LIQUORS, 3; NEGLIGENCE, 17; TRIAL, 3.

VIEW.

See NEGLIGENCE, 13.

VOLUNTEER.

See NEGLIGENCE, 5.

WAIVER.

See CONTRACT, 7; DAMAGES, 4; PROMISSORY NOTE, 1.

WARRANTY.

See BURDEN OF PROOF, 1; DAMAGES, 1; DEED, 5; EVIDENCE, 6; JUDGMENT; TRIAL, 14; WAY, 3.

WATER AND WATERCOURSE.

See EMINENT DOMAIN; EVIDENCE, 9; FISH AND FISHERIES.

WATER BOARD.

See CITY, 4.

WAY.

1. The grantee of land bounded on a street owned by the grantor and extending to a public street acquires by his deed a right of way to the latter street over the grantor's land as the way is defined on that land when the deed is delivered, but the grantor is not bound to work the way so that it shall be fit for travel, unless he has promised so to do; and such promise may be shown by oral evidence. *Cole v. Hadley*, 579.
2. The grantee of land bounded on a private street acquires by estoppel a right of way in the street against the grantor and his heirs and assigns only when the grantor owns the street or has the right to grant such an easement in it; and an oral agreement by the grantor to give the grantee a right of way over land of other persons is within the statute of frauds, Pub. Sts. c. 78, § 1, cl. 4. *Ibid.*
3. The law that, if one conveys a part of his land in such form as to deprive himself of access to the remainder of it unless he goes across the land sold, he has a way of necessity over the granted portion, applies to the conveyance of land for a railroad by a warranty deed which says nothing about a right of way across the land conveyed and the use to be made of it, although the description shows that a railroad is located there, and a clause in the deed releasing damages to the grantor's estate "by reason of the location or construction" of the railroad cannot be construed as a release of the way of necessity to his land beyond; and the fact that the railroad provided and maintained a farm crossing for him for many years indicates that the stipulation was not understood to apply to his right of way. *New York & New England Railroad v. Railroad Commissioners*, 81.

See HIGHWAY.

WIDOW.

See DEVISE AND LEGACY, 4-6.

WILL.

See CONSTITUTIONAL LAW, 2; DEVISE AND LEGACY; EXECUTOR, 1, 2; QUIETING TITLE, 1, 3; SUPREME JUDICIAL COURT, 8.

WITNESS.

1. It is not error, in a criminal case, to refuse to instruct the jury that it would not be safe to convict the defendant upon the testimony of an accomplice, unless corroborated in a material point, or that such testimony should be scrutinized with great care and caution. *Commonwealth v. Clune*, 206.
2. There is no rule of law that, if a witness in a case has sworn falsely in one particular, it is unsafe for the jury to rely on any part of his testi-

mony, or upon any uncorroborated statement by him; but the credibility of a witness is for the jury. *Commonwealth v. Clune*, 206.

See DEPOSITION; EVIDENCE, 13, 17, 19, 30-33; EXPERT; MECHANIC'S LIEN, 3; NEW TRIAL, 8-6; PERJURY; TRIAL, 11.

WORDS.

- "Across the easterly corner." See *Jones v. Adams*, 224, 229.
- "Adjoining property." See *Spaulding v. Smith*, 543.
- "And cruelly." See *Commonwealth v. Edmands*, 517.
- "And their heirs and assigns." See *Horton v. Earle*, 448, 450.
- "Any advance by way of marriage portion." See *Croft, petitioner*, 22, 28.
- "Any person." See *Commonwealth v. Johnson*, 596.
- "Assigned and heard by the full court sitting in Boston." See *Commonwealth v. Robertson*, 90.
- "Building." See *Easthampton v. Hill*, 302.
- "By fraud and misrepresentation, and without any consideration therefor." See *Gilmore v. Williams*, 351, 353.
- "By reason of the location or construction." See *New York & New England Railroad v. Railroad Commissioners*, 81.
- "Commodity." See *Minot v. Winthrop*, 113.
- "Control." See *Gray v. Parke*, 582, 584.
- "Deal." See *First National Bank of Greenfield v. Coffin*, 180, 182.
- "Debtors." See *Stearns v. Hemenway*, 17; *Kellogg v. Leach*, 45.
- "Due care." See *Brick v. Bosworth*, 334, 338.
- "During her natural life." See *Collins v. Wickwire*, 143, 145.
- "Dwelling-house." See *Thomas v. Commercial Union Assurance Co.* 29.
- "Excise." See *Minot v. Winthrop*, 113, 115, 119.
- "For examination before some magistrate authorized to act." See *Stearns v. Hemenway*, 17.
- "Guaranteed." See *Field v. Lamson & Goodnow Manuf. Co.* 388, 393.
- "Guaranty." See *Field v. Lamson & Goodnow Manuf. Co.* 388, 392.
- "Has a tendency to show." See *Carmody v. Boston Gas-Light Co.* 539, 542.
- "He." See *Kellogg v. Leach*, 45, 46.
- "Hotel." See *Thomas v. Commercial Union Assurance Co.* 29.
- "In said county." See *Commonwealth v. Wheeler*, 429.
- "In the employment." See *Doyle v. Fitchburg Railroad*, 66, 69.
- "Intoxicating liquors." See *Commonwealth v. Kyne*, 146.
- "Is enough to show." See *Carmody v. Boston Gas-Light Co.* 539, 542.
- "Is *prima facie* evidence of." See *Carmody v. Boston Gas-Light Co.* 539, 542.
- "Is sufficient to show." See *Carmody v. Boston Gas-Light Co.* 539, 542.
- "Kill and murder." See *Commonwealth v. Clarke*, 495.
- "Lease for more than seven years." See *Toupin v. Peabody*, 473.
- "Marriage portion." See *Croft, petitioner*, 22, 27.
- "More or less." See *Olson v. Keuh*, 465, 466.
- "Officers of the city." See *O'Brien v. Thorogood*, 598, 599.
- "Passenger." See *Doyle v. Fitchburg Railroad*, 66, 67.

- "Produce, goods, wares, merchandise." See *Minot v. Winthrop*, 113, 119.
"Public address." See *Commonwealth v. Davis*, 510.
"Reasonable." See *Minot v. Winthrop*, 113, 115, 129.
"Reasonable doubt." See *Commonwealth v. Kendall*, 221.
"Relation." See *Horton v. Earle*, 448.
"Reputation." See *Bliss v. Johnson*, 323, 324.
"Right of said estate at her decease." See *Collins v. Wickwire*, 143, 145.
"Rulings of the court as made." See *Brick v. Bosworth*, 334, 336.
"Said debtor." See *Stearns v. Hemenway*, 17.
"Services." See *Tracy v. Waters*, 562.
"Standing, riding, or being." See *Anthony v. Mercantile Mutual Accident Association*, 354, 358.
"Stop." See *Commonwealth v. Derby*, 183.
"Such sum or sums." See *Croft, petitioner*, 22, 28.
"Superintendence." See *Dowd v. Boston & Albany Railroad*, 185; *Bowers v. Connecticut River Railroad*, 312.
"Then and there." See *Commonwealth v. Robertson*, 90, 91.
"To support all the fence around said land." See *Beckman v. Davidson*, 347.
"Water board." See *O'Brien v. Thorogood*, 598, 601.
"Ways, works, or machinery." See *Brouillette v. Connecticut River Railroad*, 198; *Bowers v. Connecticut River Railroad*, 312.
"When all is completed." See *Beharrell v. Quimby*, 571.
"Within the intent and meaning of the conditions herein recited." See *Anthony v. Mercantile Mutual Accident Association*, 354, 357.
"Within the travelled way." See *Moran v. Palmer*, 196.
"Without the permission of the proprietors." See *Commonwealth v. Skatt*, 219, 220.
"With the right to dispose of the same by gift or will at her decease." See *Collins v. Wickwire*, 143, 145.

WRIT OF ENTRY.

See BOUNDARY, 1.

WRITTEN INSTRUMENTS.

See CONTRACT; DEED; EVIDENCE, 7, 32, 34-36; LEASE; MORTGAGE; NEW TRIAL, 4; PROMISSORY NOTE.

ERRORS NOTED IN PREVIOUS VOLUMES OF THIS SERIES.

VOLUME CXLVI.

Page 369, 5th and 6th lines from bottom, for "§ 1" read "§ 2."

VOLUME CLL

Page 266, 9th and 11th lines from bottom, for "§ 1" read "§ 2."

VOLUME CLIII.

Page 113, 3d line of 4th head note, for "c. 43" read "c. 243."

Page 242, 3d line of 3d head note, for "insolvent" read "solvent."

VOLUME CLIV.

Page 181, 1st line of 1st head note, for "creditor's" read "grantor's."

Page 579, 3d line from end of 2d head note, for "c. 283" read "c. 383."

VOLUME CLV.

Page 284, 2d line of 4th head note, for "plaintiff's" read "defendant's."

VOLUME CLVI.

Pub. Sta. c. 167, § 61, p. 26, and c. 112, § 18, p. 161, omitted in table of statutes cited.

Page 203, 10th line from bottom, for "plaintiff" read "defendants."

Page 313, 2d line from end of 2d head note, insert "for the property of the testator" after "estate."

Page 387, 3d line of head note, for "ruling" read "refusal."

Page 387, 4th line of head note, insert "to rule that the defendant was entitled" after "judge."

VOLUME CLVII.

U. S. Sta. § 4557, p. 159, and St. 1854, c. 448, § 45, p. 178, omitted in table of statutes cited.

Page 469, 11th line from top, for "§ 144" read "§ 44."

VOLUME CLVIII.

Page 253, 19th line from bottom, for "1855" read "1885."

Pub. Sta. c. 49, § 79, p. 567, omitted in table of statutes cited.

Page 598, 2d line of 1st head note, for "XXV." read "XXVI."

VOLUME CLIX.

Page 181, 15th line from top, for "son in law William F. Wharton" read "grandson William P. Wharton."

Page 511, 12th line from bottom, insert "apply to officers of all corporations" after "corporations."

VOLUME CLX.

Page 114, 11th line from top, for "he replied that the demandant Snow, not being present," read "he replied that Snow, the demandant not being present," etc.

VOLUME CLXI.

Page 178, 1st line from top, for "the witness" read "a witness."

Page 432, 2d line of 1st head note, for "§ 18" read "§ 3."

Page 471, 16th line from top, for "137 Mass. 247" read "147 Mass. 287."

HARVARD LAW LIBRARY

